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Supreme Court, U. S.
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In the Supreme Court of the United States

No. A-140

A. HENRY TAGER,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

No. A-140

A. HENRY TAGER,
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UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

I.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported in ..... F.2d ..... A copy of the opinion is appended hereto as Appendix A.

II.

GROUNDS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit affirming the judgment of conviction of the United States District Court for the District of Kansas, sought to be reviewed herein, was entered on May 17, 1973. Petitioner's Petition for a Rehearing was denied on July 5, 1973. A copy of the order denying said Petition for a Rehearing is appended hereto as Ap-

pendix B. By order dated July 27, 1973, Petitioner was granted an extension of time to September 3, 1973, within which to petition for certiorari.

Jurisdiction is conferred upon the Court to review the judgment of the Court of Appeals for the Tenth Circuit by virtue of 28 U.S.C. Sec. 1254 and Rules 19 and 22 of the Rules of the Supreme Court.

III.

QUESTIONS PRESENTED FOR REVIEW

A. The Petitioner having been given concurrent sentences on a count charging the filing of a false income tax return and a second count charging conspiracy to defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service in the ascertainment, computation, assessment and collection of income taxes, did the Court of Appeals for the Tenth Circuit err in declaring moot questions relating to the validity of the conviction on the conspiracy count, and refusing to consider the adverse collateral legal consequences of the concurrent sentence doctrine, and the applicability of *Benton* v. *Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 321 (1969). As a subsidiary question fairly comprised therein, should not the Court clarify *Benton* in order to clearly delineate whether or not the concurrent sentence doctrine has continuing vitality, or should be abolished, and in doing so, eliminate a serious conflict of interpretation between the circuits relating to the *Benton* holding and the doctrine in general?[1]

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1. The question is closely related to the served sentence doctrine of mootness discarded in *Sibron* v. *New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).

B. Where two overt acts were added in a new indictment obtained by the Government in order to avoid the bar of the statute of limitations, was it error for the trial court to refuse to instruct in such a manner so as to properly present for the jury's determination the question of whether such overt acts were in furtherance of the alleged conspiracy, or efforts to conceal such conspiracy? As a subsidiary question fairly comprised therein, does the evidence presented in this case fall directly within the reach of *Grunewald* v. *United States*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957), and its predecessors?

C. Does the vague, far-flung nature of the charge of conspiracy in this case, and the indiscriminate use of trifling overt acts to avoid the bar of the statute of limitations make this case another extension of the crime of conspiracy condemned in *Krulewitch* v. *United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949), and thus exemplify the urgent need for the Court to limit the scope of the crime of conspiracy?

D. Taking into consideration the scope and nature of the alleged conspiracy, the fact that no relationship was shown between the charge of filing of a false return and the charge of conspiracy, the danger of spillover, and the further danger that Petitioner would be thwarted and confounded in his defense, do such elements compel separate trials of the filing of a false return and conspiracy charges?

IV.

STATUTORY PROVISIONS

26 U.S.C. Sec. 7206(1):

Any person who—

"(1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * *"

18 U.S.C. Sec. 371:

"*Conspiracy to commit offense or to defraud United States.*—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

V.

STATEMENT OF THE CASE

The Petitioner was indicted in KC-CR-1458, hereinafter referred to as "KC-1458", on June 28, 1971, in the United States District Court for the district of Kansas at Kansas City, Kansas. Count I charged the subscribing and filing by the Petitioner of a false United States income tax return for the calendar year 1963 in violation of 26 U.S.C. Sec. 7206(1). Count II charged the same act on the part of the Petitioner for the year 1964. Count III charged violation of 18 U.S.C. Sec. 371 in that from on or about the first day of January, 1962, and continuously thereafter up to June 16, 1971, the Petitioner and an unindicted co-conspirator, one Robert C. Jones, did unlawfully, knowingly, and willingly conspire with each other and with other unknown persons to defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service in the ascertainment, computation, assessment and collection of income taxes. It was charged that the Petitioner and the unindicted co-conspirator Jones agreed and conspired to file 1962 United States tax returns for Salem Investment Company, Town Realty Corporation, and the Jones & Tager law partnership, which were false and fraudulent with reference to the sale of securities, and such returns were in fact filed; that they would fail to file United States tax returns for certain corporations for 1963, and would fail to file Jones, Tager & McDaniel law partnership returns for 1963 and 1964, and such returns were not filed; that they would buy and sell securities in the names of these corporations, the Petitioner and the law partnership, buying in one name and selling in another so as to make the transaction difficult to trace; and that

they would not make available adequate records to the Internal Revenue Service agents, and did not make such records available. Eight overt acts were charged. Five overt acts consisted of unindicted co-conspirator Jones signing and causing to be filed one partnership return, two corporate tax returns, and two individual returns. The other three overt acts related to the Petitioner signing and filing three individual returns. The first overt act was alleged to have occurred on January 2, 1964, and the last on April 18, 1966 (R. Vol. 9, pp. 1-6).

However, to avoid a holding that the five year statute of limitations would be applicable (18 U.S.C. Sec. 3282) rather than the six year period provided in the Internal Revenue Code (26 U.S.C. Sec. 6531), the Government obtained a new indictment on October 15, 1971 (KC-CR-1506) hereinafter referred to as "KC-1506" (R. Vol. 9, p. 8). Count III of KC-1458 was then dismissed (R. Vol. 9, p. 57).

The later indictment repeated the charges alleged in Count III of KC-1458, but added two additional overt acts: that on November 29, 1966, the Petitioner had a conversation with two named revenue agents, and that on October 29, 1968, he participated in a conference attended by revenue agents and an accountant. The last overt act was abandoned by the Government during oral argument before the Court of Appeals.

The two indictments were ordered tried together over the objections of the Petitioner (R. Vol. 9, p. 57), and went to trial on May 23, 1972.

The jury found the Petitioner not guilty on Count I of KC-1458, and returned verdicts of guilty on Count II of KC-1458 and the conspiracy charge contained in KC-1506 (R. Vol. 9, p. 161). KC-1506 was treated as Count III for the purposes of trial.

Motions for a New Trial (R. Vol. 9, p. 162) and "To Set Aside the Jury Verdict of Guilty and to Enter a Judgment of Acquittal" (R. Vol. 9, p. 167) were duly filed. On August 28, 1972, the motions were denied (R. Vol. 9, p. 174). On September 7, 1972, the Petitioner was sentenced to thirty months imprisonment on Count II of KC-1458 and to a similar term on the conspiracy charge in KC-1506, the second sentence to run concurrently with the first (R. Vol. 9, p. 179). Costs of prosecution in the sum of $3,546.49 were assessed against the Petitioner (R. Vol. 9, p. 181).

KC-1506

The evidence offered by the Government to prove a conspiracy was complex, confusing, and from the record, often unintelligible. There was no direct proof of an agreement to conspire as charged; therefore, the Government's evidence was largely circumstantial. Such evidence consisted of eight tax returns, the fact that all of the sales and purchases of securities were not on the returns, or were understated, and to avoid the bar of the statute of limitations, the last two overt acts charged in KC-1506.

It was established that there was no record that the Jones & Tager law partnership had filed a partnership return for 1963, that the Jones, Tager & McDaniel had filed a partnership return for 1964, or that the Town Realty Corporation and Salem Investment Company had filed corporate returns for 1963 (Tr. 44-51). It was also proved that Jones and the Petitioner had signed the various partnership, corporate and individual returns charged as overt acts (a) through (h) in KC-1506 (Government Exs. 1, 2, 3, 4, 5, 9, 10 and 11).

The Government then proceeded to attempt to establish the conspiracy through a number of witnesses and a complex maze of documents and summaries designed to

show not that the Government had actually lost any taxes, but that the intricacies of the security transactions, the failure to report all of such transactions, the buying in one name or entity, and selling in another name or entity, the failure to produce adequate records and fully cooperate with Internal Revenue agents, all resulted in a planned scheme to defraud the Government. Highly summarized, the salient features of the Government's evidence follows:

Representatives of five brokerage houses identified Petitioner's ledgers and records of accounts (Tr. 205-210, 221-223, 237, 473). By means of a probably ill-advised stipulation (Joint Ex. 1), the customer ledgers and records of accounts of fourteen other brokerage houses relating to Petitioner were agreed to be true and complete copies of such records, and were received in evidence without explanation by representatives of such houses.[2]

The law partnership of Jones & Tager was in existence from 1957 to January, 1965 (Tr. 424, 446). Jones' testimony established that all the details of the stock transactions were handled by the Petitioner. It further showed that his knowledge of the transactions was almost nil. Seemingly, the only coordinated effort between Jones and the Petitioner related to borrowing money from banks in order to make purchases (Tr. 438-439). He was also without knowledge of how and what was allocated to the various disputed returns (Tr. 439-440). While it is true that the accountants had difficulty reconciling the figures and tracing the stock transactions, Jones could not help them and referred their questions to Petitioner (Tr. 440). As far as Jones was concerned, the returns were correct (Tr.

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2. These records were later used in summaries of Petitioner's security transactions prepared by Government agents and received in evidence as Govt. Exs. 154 and 156.

441). After dissolution of the partnership, the only contact between Jones and the Petitioner related to winding up their partnership affairs (Tr. 446-447). He and the Petitioner at all times made their files available to the Internal Revenue Service and signed waivers allowing extensions of time (Tr. 449). While he knew he had lost money on the transactions, he did not know how much he had lost (Tr. 449). Jones insisted he had no personal knowledge of the actual purchases and sales and made none himself (Tr. 452). All of this witness' testimony was uncontroverted. It is difficult to find any evidence of any agreement to conspire from this testimony.

Three accountants who had worked on the various disputed returns were called by the Government. The information in the 1962 partnership return which reported Jones & Tager sales of $1,171,456.19, and Salem Investment Company sales of $1,982,607.06 with a $449,432.15 loss on the sales, with adjustments, was obtained from various stock brokers and the Petitioner (Tr. 284, 287-289). Records were also obtained from banks. There was testimony that while stocks were "occasionally" purchased in one name and sold in another, they were drawn into one group and reported in the "total" group (Tr. 295-297).

One accountant, Franke, who had prepared the partnership return for 1963, and the Petitioner's personal returns from 1963 to 1970, stated emphatically that at no time did he perceive any plan to defraud the Government (Tr. 343, 361, 377-378). He pointed out that he had great difficulty accumulating information since Petitioner's records were voluminous, widely scattered, and at times incomplete and confused (Tr. 368-369). He was satisfied that to the best of Petitioner's knowledge, all the information was furnished (Tr. 376). Relating to the question of the statute of limitations, the witness testified that other than

the 1963 and 1964 returns, he found nothing in the Petitioner's records that linked him to Jones (Tr. 377-378).

The third accountant (Haith) testified to the crucial 1962 returns of the law partnership, Town Realty and Salem Investment. His experience paralleled that of the other accountants: The transactions were vast and the records incomplete. After months of work, he finally came up with what he considered had transpired in Petitioner's affairs (Tr. 571-572). He also treated all of the transactions as Jones & Tager transactions, no matter what name was used (Tr. 574).

Marvin D. Fiant, an internal revenue agent, was called by the Government. Through him a foundation was laid for the introduction of Government Ex. 156, a summary of the sales and purchases of the involved securities. The exhibit was prepared, according to the witness, from exhibits received in evidence. It was a confusing document which purported to show how stocks were purchased in one name and sold in another. Strenuous objection was made to this exhibit (Tr. 630), but it was admitted by the court (Tr. 638).

The Government introduced through this witness a number of Government exhibits relating to stock brokers' accounts and records which had been previously received in evidence out of the presence of the jury, permitting him to place his own interpretation on many of them. They were offered for the purpose of laying a foundation for the Government summaries. The Government then offered its Exhibit No. 154, the summary of the sales of securities (Tr. 687). Objections were overruled and it was admitted (Tr. 690). This was the crucial exhibit.

The witness then compared the summary of sales of securities as shown on Govt's Ex. 154 with the various returns upon which the Government's case was based.

Testimony generally was to the effect that certain sales shown on Govt's Ex. 154 did not appear on these various returns (Tr. 698-704).

Fiant testified concerning the interview of November 29, 1966 (overt act (i)). The agents were seeking information as to where the Petitioner had dealt in securities. They were given the names of five or six brokerage houses (Tr. 706-707). Shortly after the meeting the Petitioner gave them a trunk load of records (Tr. 709). The witness complained that no brokerage records were included in the material, and that the Petitioner said nothing about how he reported securities transactions or his method of buying and selling (Tr. 709, 710).

There was another interview on October 29, 1968 (overt act (j)). The Petitioner was asked at that time why he did not report security transactions on his return and his answer was that he was sure those losses exceeded his gains and therefore he didn't feel he needed to report the sales. He did not say anything about the way he was purchasing or selling securities (Tr. 710).

Fiant also testified to Govt's Ex. 154, the crucial summary of sales. This summary consisted simply of figures that were taken from exhibits admitted into evidence. There was no attempt to check certificate numbers, nor was there any attempt to cross-check (Tr. 749). There was no attempt to show the losses and gains, if gains there were, involved in the transactions (Tr. 750). The witness also described Govt's Ex. 156 as a schedule he prepared in the case of securities which were purchased in one name and sold in another name (Tr. 771-776). He testified that it was possible that the exhibit is not necessarily correct (Tr. 782).

The last Government witness was Martin J. Broderick, another special agent (Tr. 821). He had an interview

with him on November 29, 1966 (Tr. 822). Security transactions were discussed with the Petitioner on that date. Broderick had considerable difficulty tracing security transactions. This was discussed with the Petitioner and he was asked to give them a list and to name the stockbrokers he had dealt with; he named about six stockbrokers. They learned through their investigation that he dealt with many other brokers (Tr. 823). Through information obtained from a Kansas City bank, they were able to obtain names of brokers and banks through whom he had received securities (Tr. 824). They went to New York and walked up and down Wall Street and went into brokers' offices and found in many places that he did have accounts they hadn't been told about (Tr. 826). The witness did not elaborate.

At the conclusion of the investigation, the Petitioner was asked to come into the office and discuss the findings. At this time he was asked to explain why he had not reported those securities transactions which were found in his name and were not reported on his 1963 and 1964 tax returns. His answer was that he felt he had lost more money than he gained and did not think it was necessary to report this information on his tax returns (Tr. 827).

Count II, KC-1458

This count charged the filing by the Taxpayer of a false income tax return for the year 1964. Proof of this charge was based on a cash disbursement journal of Policy Budget Plan, Inc. (Govt's Ex. 13-A), and a number of checks of the firm made payable to, signed by, and endorsed by the Taxpayer, which were claimed by the Government to have been in the nature of unreported income. Mr. Ewing, former president of Policy Budget Plan, Inc., was the Government's key witness in this regard. The cash disbursement journal was identified by

the witness as a double entry type of book. The checks are listed by number, date and what they are for. There is also a sundry column. This column contains code numbers identifying what the check is for (Tr. 133, 134).

Over objection, the Government proceeded to put in a series of checks keying them to the cash disbursement journal. The total sum of the checks drawn payable to the Petitioner for the month of January, 1964, as shown on the recap page of the journal was $27,065.75 (Tr. 147). The sundry recap column showed a loan repayment, but the witness did not know who repaid the loan, but somebody had (Tr. 148, 149). He also testified that two company checks and two universal checks offered by the Government were not recorded in the journal (Govt's Exs. 34, 35, 36 and 37). The witness admitted that Govt's Exs. 34 and 35 did not have bank stamps indicating that they had ever been cashed (Tr. 170, 178). However, in spite of the fact that the two checks were not shown to have been cashed or recorded, and the two universal checks had not been recorded, the court held that the Petitioner was bound by a stipulation which listed a number of checks, including these four checks, and provided that the checks were cashed by the Petitioner and not used for company purposes (Tr. 177).

The Govt's Ex. 13-B, the other book of the double entry set of books, was not admitted by the court. Thus, although the company had a double entry set of books, only the cash disbursement journal went in under the shop-book statute, 28 U.S.C. Sec. 1732 (Tr. 119). This was so although the witness admitted discrepancies and that the book did not give a true picture of books set up in the normal course of business (Tr. 181, 182). The cash disbursement journal was the crucial aspect of the Government's proof of Count II, KC-1458. The evidence seemed to establish quite clearly that the book was unreliable, and Mr. Ewing so testified.

VI.

ARGUMENT

A. The Petitioner having been given concurrent sentences on a count charging the filing of a false income tax return and a second count charging conspiracy to defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service in the ascertainment, computation, assessment and collection of income taxes, did the Court of Appeals for the Tenth Circuit err in declaring moot questions relating to the validity of the conviction on the conspiracy count, and refusing to consider the adverse collateral legal consequences of the concurrent sentence doctrine, and the applicability of Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 321. As a subsidiary question fairly comprised therein, should not the Court clarify Benton in order to clearly delineate whether or not the concurrent sentence doctrine has continuing vitality, or should be abolished, and in doing so, eliminate a serious conflict of interpretation between the circuits relating to the Benton holding and the doctrine in general?

The conspiracy charge contained in KC-1506 occupied the great bulk of the trial time. The briefs of the Government and Petitioner, and argument before the Court of Appeals, again emphasized a serious and studied concern relating to the charge. The complex legal questions raised, the apparent conflict with *Krulewitch* v. *United States,* supra, *Lutwak* v. *United States,* 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953) and *Grunewald* v. *United States,* supra, and the inconsequential nature of the overt acts relied upon to escape the bar of the statute of limita-

tions, occupied the thoughts and energies of counsel. The application of the concurrent sentence doctrine was never suggested by the Government. Therefore, counsel for Petitioner were taken by complete and utter surprise when the court elected to declare the conspiracy issues moot if the conviction on Count II of KC-1458 withstood its scrutiny. Finding the conviction on Count II could be upheld and furthermore, since concurrent sentences were imposed, the court, following authorities holding likewise,[3] but failing to consider and completely ignoring others which cast doubts upon the continued vitality of the doctrine[4] did not reach the legality of the conviction on the conspiracy charge. Thus, by refusing to consider the conspiracy conviction, and holding it irrelevant, the Petitioner stands convicted of not one felony, but two—even though one conviction may be invalid. On the strength of the conviction on the false return charge involving approximately $27,000.00 of allegedly unreported income, the Petitioner stands convicted of a conspiracy allegedly involving approximately $5,000,000.00 in securities transactions.[5]

The obvious danger of spillover was cast aside with the terse comment that there was no indication that the alleged errors with respect to the conspiracy charge in any way affected the conviction on the tax evasion charge.

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3. *Hirabayashi* v. *United States,* 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943); *Lawn* v. *United States,* 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321(1958).

4. *Benton* v. *Maryland,* supra; *United States* v. *Von Roeder,* 435 F.2d 1004 (10 Cir. 1970).

5. In its opinion, the court stated that much space and effort had been devoted to the claimed invalidity of the conviction on the conspiracy charge, whereas the Count II conviction in KC-1458 was not seriously disputed. Issue is taken with this statement. Petitioner vigorously contested the receiving into evidence of certain matters which it is claimed were legally impermissible.

In his petition for rehearing, the Petitioner pointed out the doubt cast on the concurrent sentence doctrine by *Benton,* as well as the view of the Court of Appeals for the Tenth Circuit as expressed in *United States* v. *Von Roeder,* 435 F.2d 1004 (1970).

We submit that the facts of this case, coupled with the doubts and confusion demonstrated by the circuits, and *Benton's* lack of gloss, impels that *Benton* be reexamined and the concurrent sentence doctrine either clarified or abolished.[6] Additionally, since the concurrent sentence doctrine is closely and inextricably connected with the question of mootness as exemplified by *Sibron* v. *New York,* 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) the mootness question generally requires clarification.

Prior to *Benton* the Court reviewed the mootness problem in a number of cases. *Sibron* v. *New York,* supra, supplied the necessary gloss to exceptions to the "doctrine" of mootness. In *Sibron,* the defendant had already served a six-month sentence before the case came before the Court. It was asserted by the Government that because Sibron had completed service of his sentence, the case became moot under *St. Pierre* v. *United States,* 319 U.S. 41, 63 S.Ct. 910, 87 L.Ed. 1199 (1943). The Court concluded that the case was not moot and reviewed the history of the doctrine. It was pointed out that *St. Pierre* recognized two exceptions to the "doctrine" of mootness. One of the exceptions is particularly pertinent to the case at bar. Adjudication of the merits of the criminal case is permitted where "either under state or federal law further penalties can be imposed * * * as a result of the judgment

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6. In *Benton* it was said: "* * * A stronger case for total abolition of the concurrent sentence doctrine may well be made in cases on direct appeal, as compared to convictions attacked collaterally by suits for post-conviction relief. Because of our disposition of this case, we need not reach this question." 395 U.S. at 793, footnote 11, and 89 S.Ct. at 2062.

which has * * * been satisfied."[7] *St. Pierre* implied that the burden was on the defendant to show the existence of collateral legal consequences. Three years later in *Fiswick* v. *United States*, 329 U.S. 211, 67 S.Ct. 224, 91 L.Ed. 196 (1946), however, the Court, in holding that a criminal case did not become moot upon release of the defendant, noted that certain collateral consequences were present, such as possible deportation, or an obstacle to Fiswick becoming an American citizen. It thus appeared that the burden was not on the defendant to prove such consequences.

The next case which dealt with the question of collateral consequences was *United States* v. *Morgan*, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248 (1954), where the probability existed that the defendant had been subjected to a higher sentence as a recidivist by a state court on account of the old federal conviction he sought to attack. Without reviewing the possible disabilities that may be visited upon Morgan, or alluding specifically to the recidivist sentence, the Court stated:

> "Although the term has been served, the results of the conviction may persist. Subsequent conviction may carry heavier penalties, civil rights may be affected. As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to show that this conviction was invalid." (346 U.S. at 512-513, 74 S.Ct. at 253).

Three years later in *Pollard* v. *United States*, 352 U.S. 354, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957), the Court abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed. The *Sibron* Court in referring to *Pollard* made this revealing statement:

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7. 319 U.S. at 43, 63 S.Ct. at 911.

> "The court thus acknowledged the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences. The mere 'possibility' that this will be the case is enough to preserve a criminal case from ending "ignominiously in the limbo of mootness.' *Parker* v. *Ellis,* 363 U.S. 574, 577, 80 S.Ct. 909, 911, 4 L.Ed.2d 963 (1960) (dissenting opinion." (p. 1899).

In *Sibron,* a number of possible collateral consequences were mentioned, the Court finally concluding that *St. Pierre* must be read in light of later cases to mean that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of a challenged conviction. It held that Sibron had a substantial stake in the judgment of conviction which survived the satisfaction of the sentence imposed on him.

We now turn to the related question of mootness within the context of the concurrent sentence doctrine.

The concurrent sentence doctrine appears to have originated in *Claassen* v. *United States,* 142 U.S. 140, 146, 147, 12 S.Ct. 169, 35 L.Ed. 966 (1891). Even so, the applicability of *Claassen* and the consistency with which it had been followed was questioned before *Benton.* The Court had at least on one occasion reversed convictions on some counts of a multi-count indictment where erroneous sentences had been imposed.[8]

A year after *Sibron, Benton* v. *Maryland,* supra, was decided. Here, the accused was convicted in the state court on both larceny and burglary charges upon which

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8. *Putnam* v. *United States,* 162 U.S. 687, 16 S.Ct. 923, 40 L.Ed. 1118 (1896); see also *Ballew* v. *United States,* 160 U.S. 187, 16 S.Ct. 263, 40 L.Ed. 388 (1895).

concurrent sentences of five years on the larceny charge and fifteen years on the burglary charge were imposed. On appeal, the larceny conviction was attacked on double jeopardy grounds. After oral argument, it became clear that the existence of a concurrent sentence, which included the undisputed burglary count, might prevent the Court from reaching the validity of the larceny count. The case was rescheduled for argument limited to the following question:

> "Does the 'concurrent sentence doctrines,' enunciated in *Hirabayashi* v. *United States,* 320 U.S. 81, 105, 63 S.Ct. 1375, 87 L.Ed. 1774, and subsequent cases, have continuing validity in light of such decisions as *Ginsberg* v. *New York,* 390 U.S. 629, 633, n. 2 [88 S.Ct. 1274, 20 L.Ed.2d 195], *Peyton* v. *Rowe,* 391 U.S. 54 [88 S.Ct. 1549, 20 L.Ed.2d 426], *Carafas* v. *LaVallee,* 391 U.S. 234, 237-238 [88 S.Ct. 1556, 20 L.Ed.2d 554], and *Sibron* v. *New York,* 392 U.S. 40, 50-58 [88 S.Ct. 1889, 20 L.Ed.2d 917]?"[9]

After reargument, the Court reviewed the history of the concurrent sentence doctrine, pointing out that it took root in this country in slightly different contexts. *Locke* v. *United States,* 7 Cranch 339, 3 L.Ed. 364 (1813).[10] Similar reasoning was later applied to *Claassen* v. *United States,* supra, which held that if the defendant had been validly convicted on any one count, the other counts need not be considered. One general sentence had been imposed. However, the Court alluded to *Hirabayashi* v. *United States,* supra, as the most widely cited application of the *Claassen* approach to cases where concurrent sen-

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9. 393 U.S. 994, 89 S.Ct. 481, 21 L.Ed.2d 460 (1968).

10. *Locke* concerned a cargo which had been condemned under a libel containing eleven counts. The Court considered it unnecessary to consider Locke's challenges to all counts since it was of the opinion that the fourth count was good.

tences other than a single general sentence had been imposed. In *Hirabayashi* the defendant had been found guilty of two different offenses and had received two concurrent three-month sentences. The Court approved the lower court's judgment after considering and rejecting only one of the defendant's challenges. Since the conviction on one count was valid, the Court found it unnecessary to consider the challenges to the other count.

In *Benton*, it was pointed out that the doctrine had been widely "if somewhat haphazardly" applied by it. It was further said that one can search through the cases without finding a satisfactory explanation for the concurrent sentence doctrine. The Court then said:

> "Moreover, whatever may have been the approach in the past, our recent decisions on the question of mootness in criminal cases makes it perfectly clear that the existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy." (395 U.S. at 790, 89 S.Ct. at 2060)

The Court referred to *Sibron* which noted "the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences."[11] The Court noted that *Sibron* and a number of other recent cases had canvassed the possible adverse collateral effects of criminal convictions, and the analysis would not be repeated.[12] Nevertheless, the Court went on to point out some adverse collateral effects of criminal convictions such as habitual criminal statutes, and that both of the petitioner's convictions might some day be used to impeach his character if put in issue at a future trial.

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11. 395 U.S. at 790, 89 S.Ct. at 2060.

12. See footnote 5, 395 U.S. at 790, 89 S.Ct. at 2060.

The Court then created a serious interpretation problem when it said that it may be that in certain circumstances a federal appellate court might decide as in *Hirabayashi* that it is unnecessary to consider all the allegations made by a particular party, and that the concurrent sentence doctrine may have some continuing validity as a rule of judicial convenience. The Court declined to pursue the subject any further. It is submitted that these statements have resulted in utter confusion among the lower federal courts when presented with a *Benton-Hirabayashi* situation. However, the door is open for further consideration, since the Court had pointed out that a stronger case may in the future be presented for total abolition of the doctrine.[13]

We submit that this case presents the so-called stronger case for total abolition of the doctrine as demonstrated by the severe adverse collateral legal consequences which may be visited upon the lawyer-petitioner as will be later detailed.

Counsel are keenly cognizant of Rule 23(j) of the Rules of the Supreme Court which calls for brevity. However, the concurrent sentence doctrine was not injected in this case by the parties, but by the lower court. Having done so, *Benton* became a threshold question. In order to do justice to the important questions posed because of *Benton* and *Sibron*, the varying interpretative nuances placed on the doctrine since *Benton* and *Sibron* by the circuits, and the need for resolving all conflicts and questions relating to the doctrine and the related doctrine of mootness, we have analyzed all the cases decided by all the circuits in an effort to assist the Court in recognizing that a conflict does exist which calls for the Court's intervention.

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13. Ante, footnote 6.

First Circuit

This circuit seems to have adopted the *Benton* approach. In *Benthiem* v. *United States,* 456 F.2d 165 (1972), without mentioning *Benton,* a sentence was vacated on one count although the defendant was convicted on three counts. However, in *O'Clair* v. *United States,* 470 F.2d 1190 (1972), its view of *Benton* was clearly delineated. The defendant challenged his conviction and sentence under a two-count indictment charging violation of the federal bank robbery statute. Concurrent sentences were imposed. Although the district judge set aside the sentence on the first count, he refused to set aside the convictions for the concurrent sentence under the second count. The court rejected the government's contentions that there were generally no additional consequences arising on the conviction of a second count of the same indictment. The court referred to *Benton,* pointing out the disabilities when one is convicted on more than one count. Moreover, even if no other disabilities were incurred, the court noted that there is always the extra stigma imposed upon one's reputation.

Its future course is clear.[14]

Second Circuit

The Court of Appeals for the Second Circuit first considered the impact of *Benton* in *United States ex rel. Weems* v. *Follette,* 414 F.2d 417 (1969). It held that while *Benton* threw some doubt on the continuing strength of the concurrent sentence doctrine, it did not prevent its use altogether, particularly in cases of collateral attacks rather than direct appeal.

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14. But compare the Fifth, Eighth and Ninth Circuits, infra.

In the next two cases, the court invoked the doctrine without even mentioning *Benton*.[15]

The court took note of *Benton* in *United States* v. *Adcock*, 447 F.2d 1337 (1971), pointing out that it was aware of the admonition of *Benton* concerning the doctrine, but concluded there were no undesirable collateral consequences in the case. In *United States* v. *Delgado*, 459 F.2d 471 (1972), it simply stated without more that it had jurisdiction to review challenges to convictions on two of the counts even though concurrent sentences were imposed. Finally, in *Gaines* v. *United States*, 460 F.2d 176 (1972), the court stated its interpretation of *Benton* was that in certain circumstances and as a matter of discretion, a federal appellate court may decide it is unnecessary to consider claims of the defendant where concurrent sentences were imposed, and so elected in *Gaines*. To conclude, this circuit is placing a cautious interpretation on the language in *Benton* relating to "certain circumstances" and "discretion", and has usually denied review.

Third Circuit

The Court of Appeals for the Third Circuit generally places a liberal interpretation on *Benton*, contrary to the Second Circuit's cautious approach. In *United States* v. *McKenzie*, 414 F.2d 808 (1969), the court rejected a government request that the concurrent sentence doctrine be applied. While the court was of the opinion that *Benton* did not resolve the question whether prejudice beyond that inherent in being convicted of two offenses must be shown to obtain relief, the court found that sufficient prejudice was shown and that the defendant might some day be subject to an habitual criminal statute, or impair-

15. *United States* v. *DeStefano*, 429 F.2d 344 (1970); *United States* v. *DeNoia*, 451 F.2d 979 (1971).

ment of his opportunity for pardon or parole. The court again followed the implications of *Benton* and granted relief in *United States* v. *Conway*, 415 F.2d 158 (1969).

In *United States ex rel. LaMolinaire* v. *Duggan*, 415 F.2d 730 (1969), this circuit's views were clearly drawn by this footnote on page 736 of the opinion:

> "The concurrent sentence doctrine, which reached its pinnacle in *Hirabayashi* v. *United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943) only recently met its demise in *Benton* v. *Maryland*, * * *."

This appears to be the last utterance on the subject in this circuit.

Fourth Circuit

This circuit has had little occasion to review the concurrent sentence doctrine in the light of *Benton*. In the one case in which it did, the court recognized that the doctrine may result in collateral consequences, although it found little likelihood in that case because of a long criminal record. Nevertheless, the court saw no legal reason why a concurrent sentence, based on constitutionally impermissible evidence, should be left standing. It was vacated. *Close* v. *United States*, 450 F.2d 152 (1971).[16]

Fifth Circuit

The Court of Appeals for the Fifth Circuit has been restrictive in its interpretation of *Benton*. Prior to *Benton*, it held that since concurrent sentences imposed on different counts in a bank robbery prosecution did not exceed the maximum, there was no error. *White* v. *United States*, 402 F.2d 72 (1968). However, the Supreme Court granted

16. Compare with the holdings of the Fifth, Eighth and Ninth Circuits.

certiorari, vacated the judgment, and remanded the case for further consideraton in the light of *Benton*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 321 (1969). The Fifth Circuit then held that the concurrent sentence rule, most widely attributed to *Hirabayashi* no longer had the same validity that the circuit and others had heretofore given it. *White* v. *United States*, 419 F.2d 374 (1969). Complete review was then given.

However, the holding was reluctantly made. In *Bigham* v. *United States*, 421 F.2d 1344 (1970), the court declined to follow the rule. It said:

> "The concurrent sentence rule is not dead, though it has sustained non-mortal wounds. * * * We affirm the judgment of conviction on all counts except the conspiracy count which we find unnecessary to consider." (1346) See also *United States* v. *Barsaloux*, 419 F.2d 1299 (1969). These cases hardly comport with the *Benton* philosophy.

The court continued to adhere to the concurrent sentence doctrine in the next three cases that came before it.[17]

The court relaxed its strict views somewhat in *United States* v. *Abigando*, 439 F.2d 827 (1971), where the court decided to deal with two convictions while pointing out that it was a matter of appellate court convenience and discretion as to whether or not they should be so considered. Shortly thereafter, in *United States* v. *Ruiz*, 441 F.2d 1120 (1971), the court again reiterated its holding in *Abigando*, and not being convinced there were such consequences, refused to review the sentences.

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17. *United States* v. *Beardon*, 423 F.2d 805 (1970); *Walker* v. *United States*, 433 F.2d 306 (1970); *United States* v. *Varner*, 437 F.2d 1193 (1971).

The next two cases saw application of the concurrent sentence doctrine without any reference whatsoever to *Benton.*[18]

However, the Fifth Circuit seems to have entertained doubts as to its views of the doctrine and for the first time finally took hold of the problem of collateral legal consequences in *United States* v. *Wilkerson,* 469 F.2d 963 (1972). The court pointed out that at the outset they were met by the government's argument that the concurrent sentence doctrine as announced in *Hirabayashi* was applicable. The court disagreed. It stated that the collateral legal consequences of a criminal conviction will often justify "discretionary" appellate review. In the instant case, it found that a reduction in the number of convictions may have a significant bearing on the appellant's eligibility for parole, enhancement of his sentence by means of prior convictions if he gets into difficulty in the future may be substantially lessened, and if called upon to give crucial testimony in some future proceeding, a reduction in the number of convictions may determine his ability to withstand impeachment. However, the court clearly enunciates the principle of discretionary review so that the future holdings of this court are in doubt unless *Benton* is either clarified or the doctrine abolished.

The *Wilkerson* holding was not followed in the last two concurrent sentence cases found in this circuit; both cases invoked the doctrine with no mention of *Benton. United States* v. *Stone,* 472 F.2d 909 (1973); *Klemmurray* v. *United States,* 478 F.2d 1185 (May 15, 1973). Except for *Wilkerson,* the court appears to have scant sympathy for the collateral legal consequences aspect of the doctrine.

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18. *United States* v. *Bullock,* 451 F.2d 884 (1971); *United States* v. *Hale,* 468 F.2d 435 (1972). In *Hale,* the court cited *Hirabayashi* as authority.

Sixth Circuit

This circuit has to be aligned with the First, Third and Fourth Circuits, although only two cases were found interpreting *Benton.* In *Nowlin* v. *Neil,* 443 F.2d 8 (1971), the court pointed out that on the former appeal it had remanded the case to the district court for the consideration in light of *Benton* which was decided after the first decision of that appeal. It clarifies its views in *United States* v. *Maze,* 468 F.2d 529 (1972). In a footnote on page 536 of the opinion is found the following:

> "We have determined that, even though we affirmed the Dyer Act conviction, in which appellant received a concurrent five-year sentence, we should consider the mail fraud convictions as well. No jurisdictional impediment prevents us from doing so, and no consideration of judicial economy or efficiency have been urged to us that would outweigh the interests of appellant and the opportunity to clear his record of a conviction of a federal felony. See *Benton* v. *Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 321 (1969)."

Seventh Circuit

In the first two post-*Benton* cases this circuit invoked the concurrent sentence doctrine without referring to the doubts raised by *Benton.*[19]

The court then took a different view. In *Davie* v. *United States,* 447 F.2d 480 (1971), the court concluded that although the defendant's sentences were made concurrent to a valid sentence, "We prefer in the light of the doubt cast on the continuing validity of the 'concurrent

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19. *United States* v. *Escobedo,* 430 F.2d 14 (1970); *United States* v. *Holtzman,* 440 F.2d 923 (1971). *Lawn* v. *United States,* supra, was cited as authority in *Holtzman.*

sentence rule' by *Benton* v. *Maryland* * * * to decide the validity of the defendant's conviction under Section 176(a)." (481). In *United States* v. *Kilpatrick*, 458 F.2d 864 (1972), the court reasoned that the vitality of the concurrent sentence doctrine had been diminished by recent cases, including *Benton*, therefore it was *necessary* to inquire into the validity of the defendant's conviction on two counts of the indictment.

Finally, in *United States* v. *Tanner*, 471 F.2d 128 (1972), the court was of the opinion that *Benton* constituted a reevaluation of the concurrent sentence doctrine, and that it suggested a review as desirable where adverse collateral consequences may flow from the conviction. The court held that since they could not say there was no possibility of such undesirable collateral consequences attendant upon the convictions, it chose to consider the validity of all the challenged counts.

It must be concluded that this circuit is now resolving any doubts created by *Benton* in favor of review.

Eighth Circuit

The Court of Appeals for the Eighth Circuit has found it difficult to find any collateral legal consequences arising out of imposition of the concurrent sentence doctrine. In a series of seven cases, it found only remote collateral legal consequences, or did not refer to any, therefore refusing in any of these cases to review attacks on the invalidity of one or more counts.[20]

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20. *Kauffman* v. *United States*, 414 F.2d 1022 (1969) (The court said it was well aware of *Benton*); *Tarvestad* v. *United States*, 418 F.2d 1043 (1969); *United States* v. *Sheehan*, 428 F.2d 67 (1970) (The court said the doctrine had been "criticized" in *Benton*); *United States* v. *Leach*, 429 F.2d 956 (1970) (Again, it was mentioned that *Benton* had criticized the doctrine); *United States* v. *Besserson*, 433 F.2d 861 (1970); *United States* v. *Whitlock*, 442 F.2d 1061 (1971); *Kilcrease* v. *United States*, 457 F.2d 1328 (1972) (The court didn't bother to refer to *Benton*).

Contrasting the view of the Eighth Circuit with those of the First, Third, Fourth, Sixth and Seventh circuits, demonstrates a clear interpretative conflict. It is difficult to imagine a series of cases with no possible collateral legal consequences.

Ninth Circuit

In a post-*Benton* context, the Court of Appeals for the Ninth Circuit has reviewed the concurrent sentence doctrine more than any other circuit. In doing so, it has contributed much to the continuing strength and vitality of the doctrine in spite of the warnings in *Benton*, and the disapproval of the moot case found in *Sibron*. In a great number of cases, including two recent 1973 decisions, the court has completely ignored *Benton*.[21] In other cases, the court recognized that *Benton* did exist, but fell back on the *Hirabayashi* rule or the rule of discretion to avoid consideration of sentences imposed concurrently.[22] *United States* v. *Gonzales*, 461 F.2d 1000 (1972)

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21. *United States* v. *Cousins*, 429 F.2d 1271 (1970); *United States* v. *Parker*, 432 F.2d 1251 (1970); *United States* v. *Vaught*, 434 F.2d 124 (1970); *United States* v. *Crouch*, 442 F.2d 427 (1971); *United States* v. *LePera*, 443 F.2d 810 (1971); *United States* v. *Callahan*, 445 F.2d 552 (1971); *United States* v. *Hendricks*, 456 F.2d 167 (1972); *United States* v. *Ayala*, 465 F.2d 464 (1972); *United States* v. *Garner*, 468 F.2d 914 (1972); *United States* v. *Hamilton*, 469 F.2d 880 (1972); *United States* v. *Faulkenbery*, 472 F.2d 879 (1973); *United States* v. *Gardner*, 475 F.2d 1273 (1973).

22. *United States* v. *Goldner*, 439 F.2d 143 (1971) (Both *Hirabayashi* and *Benton* were mentioned.); *United States* v. *McKinney*, 433 F.2d 921 (1970) (*Benton* had not abolished the concurrent sentence rule of *Hirabayashi*.); *United States* v. *Holman*, 436 F.2d 863 (1970) (A similar holding.); *United States* v. *Washabaugh*, 442 F.2d 1127 (1971); *United States* v. *Fishbein*, 446 F.2d 1201 (1971); *United States* v. *Lamont*, 447 F.2d 1311 (1971); *Jordan* v. *United States*, 416 F.2d 328 (1969); *United States* v. *Lazarus*, 425 F.2d 638 (1970) (The court stated flatly that *Benton* did not undermine the concurrent sentence doctrine.); *United States* v. *Tamayo*, 427 F.2d 1072.

was a particularly hard case. Challenges had been made to convictions on five of six counts. Concurrent sentences had been imposed. The only count not challenged was the conspiracy count. The court held that the sentence on the conspiracy count was sufficient to dispose of the case. Thus, the defendant stood convicted of six crimes, although five of them may be totally invalid! *Benton* and *Sibron* certainly played no role in the court's deliberations. No erudite dissertation can ever justify such a stunning result!

We have found only four cases where the Ninth Circuit has considered convictions in a manner inconsistent with the concurrent sentence doctrine. In three of these cases a review was had but no collateral legal consequences were found.[23] In only one case has the Ninth Circuit vacated a sentence on one count of a multi-count indictment under concurrent sentence circumstances. In *United States* v. *Clizer,* 464 F.2d 121 (1972), the court vacated a conviction on one count ordering it dismissed while it affirmed conviction on another count. No reason was given for the court's radical departure from its usual practice. It is extremely difficult to reconcile this circuit's record with the statement in *Sibron* that most criminal convictions entail adverse collateral legal consequences.[24] Not once since *Benton* has this circuit recognized the existence of adverse collateral legal consequences!

Tenth Circuit

The Court of Appeals for the Tenth Circuit has been indecisive since *Benton.* In *Glazerman* v. *United States,*

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23. *United States* v. *Moore,* 452 F.2d 576 (1971) (*Benton* means discretion.); *United States* v. *Towner,* 466 F.2d 920 (1972); *United States* v. *Castro,* 472 F.2d 750 (1973).

24. 392 U.S. at 55, 88 S.Ct. at 1899.

421 F.2d 547 (1970) the doctrine was applied without mentioning *Benton*. This decision was followed by *United States* v. *Von Roeder*, 435 F.2d 1004 (1971) where Judge Seth, speaking for the court, held that even concurrent sentences under sections of the bank robbery act are precluded since *Benton*. He pointed out that in *Benton* the Court noted that real harm may result such as the habitual criminal statutes in some states. He construed *Benton* as holding that concurrent sentences may be overturned despite the lack of effect on the time served. One of the sentences was overturned.

Contrast *Von Roeder* with the third post-*Benton* decision of the Tenth Circuit, the case at bar. The court, including Judge Seth, never mentioned *Benton* or *Von Roeder*, and relied upon *Hirabayashi* and *Lawn* and a case decided by the Tenth Circuit prior to *Benton*[25] and declared that since it found the conviction on Count II of KC-1458 valid, it was not relevant to consider the validity of the judgment on the conspiracy count since concurrent sentences were imposed. Since this is the latest utterance of the Tenth Circuit, it is not unreasonable that it still is in the *Lawn* and *Hirabayashi* camp. Its reliance on pre-*Benton* cases without even a reference to *Benton* is difficult to understand, however.

District of Columbia Circuit

This circuit has shown a studied concern for the possibility of adverse collateral consequences. Holding that *Benton* makes it clear that review of sentences imposed concurrently is a discretionary one, the court has been alert to the possibility of adverse collateral consequences

25. *Baca* v. *United States*, 383 F.2d 154 (1967).

and has been liberal in finding that review should be had.[26]

Its record in this regard is the exact reverse of the Ninth Circuit which has rarely reviewed in this situation and has only decided to vacate a sentence in one case, and the Eighth Circuit, which has never granted review. Only in *Sutton* v. *United States*, 434 F.2d 462 (1970) did the Court of Appeals for the District of Columbia find no prejudice resulting from invocation of the concurrent sentence doctrine.

Summary

A defendant attacking one or more counts of a multi-count indictment where sentences are concurrently imposed will receive a reception in the circuits varying from almost automatic review to certain rejection. The First, Third, Fourth, Sixth, Seventh and District of Columbia Circuits have pursued a course leading to liberal interpretation of *Benton* and concern for adverse collateral consequences and are almost certain to review where sentences are concurrently imposed. The Second Circuit has revealed a cautious approach to *Benton* and has decided cases without reference to it. The Tenth Circuit has shown no consistency in that it has decided one case with strong reliance on *Benton*, and two cases without even mentioning the case at all, including the case at bar. The Fifth Circuit has been restrictive in its *Benton* interpretation.

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26. *United States* v. *Hooper*, 432 F.2d 604 (1970) (*Hirabayashi* may still have some useful application. The court was concerned with the time taken for opinion writing where adverse collateral consequences can be ruled out.); *Marshall* v. *United States*, 436 F.2d 155 (1970); *United States* v. *Spears*, 449 F.2d 946 (1971); *United States* v. *Thomas*, 459 F.2d 1172 (1972); *United States* v. *Alexander*, 471 F.2d 923 (1973) (It was noted that the vitality of the concurrent sentence doctrine is rapidly waning.)

Upon remand of *White*,[27] the court reluctantly reviewed and vacated, but thereafter returned to its restrictive view. It also has decided cases without reference to *Benton*. In one of its latest cases, it has shown some liberality, but carefully reiterated its position that review is discretionary.[28] The Eighth and Ninth Circuits never find adverse collateral legal consequences. All cases in the Eighth Circuit have been denied review within the *Benton* context.

It is respectfully submitted that this survey of the circuits reveals a striking need for clarification of *Benton*. Indeed, we urge that the demise of the doctrine of mootness under *Sibron* has a direct and compelling bearing on the continuing usefulness of the concurrent sentence doctrine. If a served sentence is no longer moot and can be reviewed, why not a concurrent sentence which has the same characteristics of mootness as the served sentence, and the same adverse collateral legal consequences? The same considerations must be canvassed under a *Sibron* situation as under one arising under *Benton*. Since *Sibron* holds that mootness in criminal cases no longer has a place in our system of jurisprudence, we urge that mootness within the context of the concurrent sentence doctrine should be treated in a similar fashion. It should be abolished.

Adverse Collateral Legal Consequences

While some courts are more prone to recognize the existence of adverse collateral legal consequences than others, resulting in different treatment, we submit that the *Sibron* approach is the correct one. A court should not look for some consequences—they are always there! No

27. Ante, 419 F.2d 374 (1969).

28. *United States* v. *Wilkerson*, 469 F.2d 963 (1972).

matter how depraved the defendant may be, or how long his criminal record, every additional conviction must have some effect, even though it may be remote and inconsequential. In most cases, however, it is not remote and is not inconsequential. Furthermore, the very idea that a conviction may be permitted to stand no matter how grossly invalid it may be, strikes one as being incompatible with our system of justice and fair play. The doctrine appears to be a matter of judicial convenience only, it can serve no other purpose; therefore, in view of its impact upon a defendant, should have no continuing validity.

In the case at bar, the presence of adverse collateral legal consequences cannot be denied. As in all other cases, state habitual criminal statutes, possibilities of probation or parole, the question of impeachment in future proceedings where the petitioner's testimony may be vital, and the stigma of being convicted of two felonies rather than one, are compellingly present. However, other adverse consequences are apparent here. The Petitioner is a lawyer. Assuming for purposes of argument that the conviction on Count II of KC-1458 only is eventually affirmed, the Petitioner faces disbarment, and ultimately will be disbarred. He must also serve a 30-month prison term. Eventually he will apply for reinstatement in order to practice his profession. There will be an investigation relating to his fitness to engage in the practice of law. The inquiry will reveal that he was convicted of a felony—filing a false income tax return for the year 1964. While this is not a good recommendation, it is quite conceivable that if the Petitioner becomes a model citizen, is genuinely remorseful, and shows that he has rehabilitated himself to the extent that he can be entrusted with his clients' problems, property and money, he could be reinstated. The filing of the return was an unwise act, but it did not establish in and of itself a gross character incapable of remorse, and not susceptible to rehabilitation.

However, the record goes farther. It will show that not only was the Petitioner convicted of filing a false tax return for 1964, but was engaged in a complex and massive conspiracy to cheat the government of taxes, which involved his law partnership, certain corporations, a sum in excess of $5,000,000.00, and which allegedly extended over a period of almost ten years. In view of the lower court's ruling, the Petitioner stands convicted of this charge also. He has two felony convictions against his record, rather than one, and his chances of being readmitted to the bar become extremely remote. The conspiracy conviction will haunt him the remainder of his life.

Under these circumstances, it is rather astonishing that the Court of Appeals refused to even relate to the problem of collateral consequences in this case.

B. Where two overt acts were added in a new indictment obtained by the Government in order to avoid the bar of the statute of limitations, was it error for the trial court to refuse to instruct in such a manner so as to properly present for the jury's determination the question of whether such overt acts were in furtherance of the alleged conspiracy, or efforts to conceal such conspiracy? As a subsidiary question fairly comprised therein, does the evidence presented in this case fall directly within the reach of Grunewald v. United States, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957), and its predecessors?

Overt act (i) charged that the Petitioner had a conversation with two special agents of the Internal Revenue Service on November 29, 1966, while overt act (j) alleges a conference with two special agents and a group supervisor on October 29, 1968. Unless these overt acts were efforts on the part of the Petitioner to not make adequate records available to the Internal Revenue Service as

charged in paragraph eight of KC-1506, in furtherance of and as a part of the original alleged conspiracy, the prosecution would be barred by the applicable five-year statute of limitations (28 U.S.C. Sec. 3282) since the last prior overt act had then been committed on April 18, 1966. The indictment was returned on October 15, 1971. Assuming for the purpose of argument that a conspiracy was proved, in the absence of proof of a preconceived plan or agreement to conceal evidence of the alleged conspiracy, or that the failure to give adequate records was one of the objectives of the operation, we submit that the last two overt acts did not extend the statute of limitations under the authority of *Krulewitch* v. *United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949), *Lutwak* v. *United States*, 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953), and *Grunewald* v. *United States*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957); hence, prosecution of the conspiracy charge was barred.

Before examining *Krulewitch* and its progeny, we urge that the evidence of agents Fiant and Broderick falls far short of establishing beyond a reasonable doubt that the Petitioner willfully failed to make adquate records available. The mere fact that other brokers were found by the agents does not mean willful concealment. The charge is one based on opinion only, and is a matter of speculation only. The agents weren't satisfied, but that in itself does not prove the truth of the alleged overt acts. Our law enforcement theories, traditions and precedent do not make criminality dependent upon the whims, caprices and opinions of an internal revenue agent. If the Internal Revenue Service occupies such an exalted position in our society that a citizen must approach its agents on bended knee hoping he is doing everything demanded of him and in a satisfactory manner under penalty of prosecution, then our Internal Revenue laws and their enforcement are in urgent need of a radical overhauling.

Since there was no proof of any agreement to conceal, and of necessity, all traces of any crime have to be concealed to avoid detection, we submit the facts in this case fall within *Krulewitch*. There, the charge was conspiracy to violate the Mann Act, 18 U.S.C. Sec. 2422, by transporting a woman in interstate commerce for immoral purposes. A hearsay statement of that woman, charged as a co-conspirator, was offered in evidence. It was to the effect that she had told another woman not to talk, be careful, and to wait until they got a lawyer. This was a month and a half after the transportation. The Court held that the statement was not admissible as an exception to the hearsay rule since the declaration was not made in furtherance of the objectives of the conspiracy. It was made after the objectives of the conspiracy had been achieved or had failed. The Government argued that even after the central criminal objective of the conspiracy has succeeded or failed, "an implicit subsidiary phase of the conspiracy always survives, the phase which has concealment as its objective." (336 U.S. at 443, 69 S.Ct. at 718). This theory was rejected. The Court refused to hold as admissible the declaration not made in furtherance of the conspiracy. The implicit or subsidiary conspiracy theory was also repudiated in *Lutwak* v. *United States,* supra.

Lutwak was followed by *Grunewald* v. *United States,* supra. In *Grunewald,* the defendants were convicted of conspiracy to defraud the United States by the operation of a tax fixing ring which obtained "no prosecution" rulings from the Bureau of Internal Revenue. The Court held the prosecution barred by the statute of limitations as against the Government's contention that the conspiracy also included a subsidiary agreement to conceal the conspiracy to "fix" tax cases to the end that the conspirators would escape detection and punishment. The Court reaffirmed *Krulewitch* and *Lutwak* which had rejected this theory.

The Court interpreted *Krulewitch* and *Lutwak* to mean that after the central criminal purpose of a conspiracy has been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing that the project was kept a secret or that efforts were made to conceal it. Otherwise, the life of the conspiracy would be extended indefinitely. Acts of covering up cannot in themselves constitute proof that concealment was part of the initial agreement. Sanctioning the Government's position would for all practical purposes wipe out the statute of limitations in conspiracy cases.[29]

It is strongly urged that this view makes it impossible to legally convict a taxpayer on the basis of the last two overt acts. Applying the teachings of *Grunewald* and its predecessors, can it be possible to glean from the record herein one scintilla of evidence that Jones and the Petitioner agreed that the Petitioner would not make adequate records available to Internal Revenue agents? Even if we find in the record evidence of a conspiracy to do the things alleged in paragraph five through seven of the indictment, and such things were in fact done, it is crucial to the Government's case that the charge in paragraph eight be proved, and that the overt acts (i) and (j) were committed in furtherance thereof (R. Vol. IX, 9-12). Since such an agreement has not been proved, and invocation of the implied conspiracy to conceal doctrine is impermissible, the charge in paragraph eight is unprovable, and the entire indictment in KC-1406 must fall as being barred by the statute of limitations.

It is further noted that the *Grunewald* Court was emphatic in stating that an "actual" agreement will not be implied—characterizing the Government's argument thereon as a verbal *tour de force*. This position was adopted in

29. 353 U.S. 401-402, 77 S.Ct. at 972.

the very face of voluminous evidence of efforts at concealment. There, much more than in the case at bar, concealment of fraud because of the machinations of the defendants and a bribed representative of the Bureau of Internal Revenue, was of the gravest importance.

The Court further pointed out that it would not accede to the position that the duration of a conspiracy is lengthened merely because the conspiracy is kept a secret and the conspirators take steps to "bury their traces" to avoid detection and punishment (353 U.S. at 405, 77 S.Ct. at 974).

It is difficult to distinguish the facts in *Grunewald* from those in the instant case, and it is submitted that no such distinction can reasonably be made.

One additional point: Over objections the trial court gave the following instruction numbered 19:

> "You will note that Count III of the indictment charges the conspiracy existed from on or about January 1, 1962 to June 16, 1971. If you find that within that period all the elements of the crime have been proven to your satisfaction beyond a reasonable doubt, then the crime is complete. However, you are cautioned to remember the second essential element of the crime which I explained to you in instruction No. 17.
>
> "The law provides that a person can only be prosecuted for a crime within a certain period of time following its commission. The time within which prosecution must be commenced varies with the type of crime involved and that time is specifically set out in a statute enacted by Congress, and is called the Statute of Limitations.
>
> "The statute of limitations for the crime of conspiracy as set forth in Count III is five years after the commission of the last overt act in furtherance of the conspir-

> acy. Since the *indictment in this case* was returned on October 15, 1971, you are charged that you cannot convict the defendant of the crime of conspiracy as set out in Count III unless you find beyond a reasonable doubt that one of the last two alleged overt acts (i or j) was committed by the defendant in furtherance of the conspiracy and while the conspiracy was in existence—that is during the five year period after October 15, 1966."

Measured by the standards of *Grunewald*, the instruction is grossly inadequate. It is difficult to follow the trial court's reasoning in giving the instruction in view of the far more comprehensive instructions struck down in *Grunewald.*

In that case, the trial court gave a long detailed instruction which space will not permit quoting in full.[30] The Court covered in detail the statute of limitations question, the contention of the Government that the conspiracy did not end when the "no prosecution" ruling came through, the fact that the jury had to determine the duration of the conspiracy, whether it was a continuing conspiracy to conceal the illegal acts, the fact that the jury could not imply that any agreement to conceal the illegal acts was part of the conspiracy, that the jury would have to find from the acts and declarations of the co-conspirators that there was an understanding or agreement to continue the conspiracy, that if they found that such an agreement was no more than an afterthought after certain investigations were instituted, then the jury must find as a matter of law the defendants were not guilty. The Court further elaborated on what the jury must do if they found that as part of the agreement there was an additional agreement to conceal.

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30. See 353 U.S. at 411, 77 S.Ct. at 971.

This instruction was rejected for the following reasons: First, it failed completely to distinguish between concealment in order to achieve the central purpose of the conspiracy, and concealment intended solely to cover up an already executed crime. Secondly, the jury was never told that the overt acts of concealment could be taken as furthering the conspiracy only if the basic criminal aim of the conspiracy was not attained in 1949 (date of the last "no prosecution" notice). In the case at bar that would have to be the date of the last tax return filed or the last security bought or sold as alleged in the indictment.

The Court held that the *Grunewald* jury might easily have concluded that the defendants were guilty if they merely found the central aim of the conspiracy was accomplished in 1949 and that the subsequent acts of concealment were motivated exclusively by the conspirators' fear of prosecution. The Court felt that the convictions could have been based on the impermissible theory that a subordinate agreement to conceal the central aim of the conspiracy continued after the central aim of the conspiracy had been accomplished. The Court further commented that the instruction left it open for the jury to convict even though they found that the acts of concealment were motivated purely to cover up an already accomplished crime.

Instruction 19 meets none of these standards. The trial court completely ignores the difference between concealment as a part of the conspiracy, or as an attempt to avoid detection. In fact, the concealment concept is not even mentioned. All the jury was required to do was find if one of the last two overt acts was committed in furtherance of the conspiracy. No guidelines whatsoever are given to aid the jury. To them, furtherance of the conspiracy could mean concealment thereof. The

instruction is so palpably erroneous that it defies further comment.

Reversal appears justified on the basis of this instruction alone.

C. Does the vague, far-flung nature of the charge of conspiracy in this case, and the indiscriminate use of trifling overt acts to avoid the bar of the statute of limitations make this case another extension of the crime of conspiracy condemned in Krulewitch v. United States, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949), and thus exemplify the urgent need for the Court to limit the scope of the crime of conspiracy?

It has been said that there is perhaps no crime an exact definition of which it is more difficult to give than the offense of conspiracy. *Pinkerton* v. *United States,* 145 F.2d 252, 254 (5 Cir. 1944). Such difficulty results in a large measure from the fact that the law of conspiracy has always been in a flexible and uncertain state. The cases which have been adjudged to be conspiracy appear, it has been said, "to stand apart by themselves", and to be "devoid of that analogy to each other which would render them susceptible of classification." 15A C.J.S. *Conspiracy,* Sec. 35(1). This statement is particularly apropos the federal law of conspiracy. The conspiracy statute is so loosely drawn that a broad interpretation cannot be avoided. Its breadth is incredibly far reaching with no predictable limit to its reach and scope. Nevertheless, in spite of the warning of the Court in *Grunewald* v. *United States,*[31] that it will look with disfavor upon attempts to broaden the already "pervasive and wide-sweeping nets of conspiracy prosecutions", there is no indication

31. 353 U.S. at 404, 77 S.Ct. at 974.

that government prosecutors are paying heed to this admonition.

It takes no citation of authorities to illustrate the immense scope of the statute. As long as at least two persons are involved, the number of activities that can be brought under the prohibition against conspiracy to commit any offense against the United States or to defraud the United States, or any agency thereof, or merely to interfere with the proper functions of such agency, in any manner or for any purpose, is almost without limit. The indictment in the case at bar is illustrative of the pattern the language of the statute impels. Not only that, but if the Government delays too long, as here, there is always the handy expedient of the overt act, no matter how trifling. Indeed, the conspiracy charge was to be the handiest and most potent weapon in the government prosecutor's arsenal, or as Judge Learned Hand put it: "Conspiracy, that darling of the modern prosecutor's nursery." *Harrison* v. *United States*, 7 F.2d 259, 263 (2 Cir. 1925).

Mr. Justice Jackson in his concurring opinion in *Krulewitch* showed his concern by pointing out that the case illustrated the long evolution of the elastic and pervasive offense of conspiracy. He saw that its history illustrates the "tendency of a principle to expand itself to the limits of its logic." He noted the growing but futile protest of the courts against the habit of indicting for conspiracy rather than for the substantive offense. He called it a loose practice which was a serious threat to our administration of justice. He added that the crime is so vague that it almost defies description.[32]

The Government offered proof that the 1962 Town Realty, Salem Investment and Jones & Tager returns were

32. 336 U.S. 445-448, 69 S.Ct. 719-721.

false returns, and of the failure to file the 1963 returns for the two corporations, and the 1963 and the 1964 partnership returns of Jones, Tager & McDaniel. The revenue laws proscribe these activities thereby making them criminal in nature, if proved. However, the statute of limitations barred prosecution on the returns (overt acts (a) through (h)), thereby forcing the Government to turn to the conspiracy charge using the purchase and sale of securities and the alleged act of not making records available to make a case. By means of the conspiracy charge, the Government hopefully attempted to revive the otherwise long dead patient. The transparency of the two conferences called overt acts in order to keep the patient alive is almost too obvious to discuss. Justice Jackson was keenly cognizant of the practice indulged in the case at bar by the Government when he observed in *Krulewitch*:

> "However, even when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case." (336 U.S. at 449).

All the Government proved here was the *fait accompli*. The false returns, if they were false, were filed, certain returns were not filed, and, stretching a point far beyond the proof, the Petitioner did not make all records available at the time of the two conferences making up the last two overt acts. Does the mere fact of the occurrence of these events and that Jones had been the Petitioner's law partner, establish a conspiracy to defraud the United States? We think not. Otherwise, any joint crime could be called a conspiracy by merely proving the fact that two or more persons participated in the offense. We call upon the Court to properly restrict the elements of the

crime of conspiracy before it becomes incapable of any restriction. We urge that the Court define the outer limits of the federal crime of conspiracy. Otherwise, there is no foreseeable end to those acts the ingenuity of federal prosecutors can turn into crimes. The exercise of such ingenuity, within the context of the Internal Revenue laws, as was done here, creates a frightening prospect—particularly since defense of such a sprawling charge is well nigh impossible.

D. Taking into consideration the scope and nature of the alleged conspiracy, the fact that no relationship was shown between the charge of filing of a false return and the charge of conspiracy, the danger of spillover, and the further danger that Petitioner would be thwarted and confounded in his defense, do such elements compel separate trials of the filing of a false return and conspiracy charges?

Petitioner's trial counsel were well aware of the serious implications of consolidating the two fraudulent tax return charges alleged in KC-1458 with the conspiracy charge in KC-1506 (referred to in the lower court's opinion as Count III). The granting of the Government's motion for consolidation was a death knell to the Petitioner. Relatively simple charges and comparatively small sums were involved in Counts I and II. When coupled with the conspiracy count involving a law partnership, three corporations, as well as over $5,000,000.00 in securities transactions, the case took on a different complexion. The Petitioner had to contend with the so-called spillover. Anyone who looks at it otherwise is not in step with what takes place in the court room, the jury box, and the jury room. A jury is much more apt to convict with millions of dollars involved rather than thousands. Also, filing a false re-

turn will not be placed in the same category by laymen as a conspiracy involving very large sums of money, a law partnership and corporations. The difficulties imposed upon the defense are multiplied, and the burden upon the prosecution lessened. This is particularly so when the defendant chooses not to take the stand. The far-flung and sprawling evidence adduced to support the conspiracy charge is far more difficult to explain and contain than a fraudulent tax return charge. While a defendant may take the stand to explain the latter, a hard look must be taken at the conspiracy charge before the decision to testify is reached. In the case at bar the decision was not to testify. Anyone conversant with the practicalities of the trial arena knows what this means to a defendant in spite of the court's instruction that he need not take the stand, and that the jury must give no consideration whatsoever to the fact that he does not take the stand.

The Government assured the trial court that there would be a great deal of overlapping evidence with respect to the first two counts and the conspiracy count. This representation was made to convince the court that there would be a savings in trial time and expenses. This was not so. No connection between the fraudulent tax return charges and the conspiracy charge was ever shown, nor did any material witness testify on behalf of the Government in connection with the first two charges *and* the conspiracy charge. Two distinct and separate lawsuits were involved and tried. The lower court disposed of this aspect of the case in a summary fashion by stating:

> "There is no indication that the alleged errors with respect to Count III in any way affected the conviction on Count II. See *Page* v. *United States, supra.* Hence, review of the conviction on Count III is wholly unnecessary."

This writer has never seen a federal case where the court actually lays out what must be shown to indicate that the trial of a multi-count indictment, or the trial of two or more consolidated indictments, has resulted in prejudice and spillover. The use of the overworked abuse of discretion doctrine is liberally indulged in along with the statement that the burden is on the defendant to establish prejudice. How? Does he have to produce witnesses, such as the jurymen, or experts? Actually, there is no way for the defendant to carry such a burden. The willingness to recognize such prejudice lies within the conscience of the courts. We urge that plain common sense dictates that trying Count III along with Counts I and II made all of the charges more difficult to defend and easier to sway the jury towards a conviction. To say that there was no spillover from Count III to Count II is about as unrealistic a viewpoint as one may find among practical men. We submit that one does not have to be a judge or even a lawyer to reach the conclusion that prejudice is the bedfellow of such consolidation. *Gregory* v. *United States,* 369 F.2d 185 (D.C. Cir. 1966); *Drew* v. *United States,* 331 F.2d 85 (D.C. Cir. 1964); *United States* v. *Quinn,* 365 F.2d 256 (7 Cir. 1966); *Castellini* v. *United States,* 64 F.2d 636 (6 Cir. 1933).

In *Castellini,* a prosecution based on separate transactions of making false entries, the court said:

> "* * * Appellant should not, according to the ancient formula, be confounded in the making of his defense." (636).

In *Drew,* the court lays out the test:

> "Prejudice to defendant by joinder of offenses may arise in that (1) defendant may become embarrassed or confounded in presenting separate defenses, (2)

jury may use evidence of one crime to infer a criminal disposition of defendant from which is found his guilt of the other crime, or (3) the jury may cumulate evidence of various crimes charged and find guilt when, if considered separately, it would not so find; prejudice may also reside in latent feeling of hostility engendered by the charging of several crimes as distinct from only one." (Syl. 4).

Furthermore, in the event the Court grants certiorari and reverses the conspiracy conviction, the nature and quality of the evidence presented with respect to Count II, KC-1458, will be an issue. Strenuous objections were made to Govt's Ex. 13-A, a cash disbursement journal of Policy Budget Plan, Inc., the firm which issued the checks to Petitioner claimed to be in the nature of unreported income. The Government attempted to qualify the journal as a business record under 28 U.S.C. Sec. 1732. However, the journal was only one-half of the bookkeeping system. It was a double entry set which included another book (Govt's Ex. 13-B), which was a general ledger showing a summary of all the accounts, including the Petitioner's, profit and loss statements, and a trial balance. Since the cash disbursement book was sketchy at best, being merely a record of issued checks and barren of any other complete information with reference thereto, Govt's Ex. 13-B assumed an essential role in establishing the nature of the withdrawals by the Petitioner. But, the second book was so lacking in up-to-date information, that even the trial judge said the "'postings were put off for some time", and excluded it (Tr. 119). Therefore, since this was a double entry system and the second book did not meet the requirements of 28 U.S.C. Sec. 1732, the Govt's Ex. 13-A should also have been rejected. Half of the pertinent records is not a good example of admissibility under the so-called shop-book rule. One cannot

say that proper entries in Exhibit 13-B would not have shown loans to the Petitioner rather than disbursements characterized by the Government as unreported income. Also, mistakes in the journal were uncovered, such as two checks which apparently had never been cashed (Tr. 170, 178) and improper bookkeeping procedures with respect to two other checks. It was also shown that loans to Mr. Ewing were not entered as such (Tr. 183). It is submitted that the indispensable fundamental trustworthiness required for qualification of a document under the shop book statute was totally lacking here.

This Court had occasion to consider whether Congress intended to render all regularly prepared records admissible regardless of their character and source in the landmark decision in *Palmer* v. *Hoffman,* 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), and rejected this interpretation out of hand as unwarranted in view of the history of the Act. Mr. Justice Douglas, speaking for a unanimous Court, declared that mere regularity of preparation to be an improper test of admissibility, and stated that the courts must look to the "character of the records and their earmarks of reliability . . . acquired from their source and origin and the nature of their compilation." (318 U.S. at 114). Otherwise, "the probability of trustworthiness of records . . . would be forgotten as the basis of the rule." (318 U.S. at 113-114). See also *United States* v. *Lipscomb,* 435 F.2d 795 (5 Cir. 1971). Reliability is the test. *United States* v. *Hickey,* 360 F.2d 127 (7 Cir. 1966). Measured by such tests, the cash disbursement journal failed in all respects. Without it, the charges contained in Count II were incapable of proof.

It is respectfully urged that in the event of reversal on the conspiracy charge, a new trial be granted Petitioner on Count II, KC-1458.

VII.

CONCLUSION

> "The words of such an act as the Income Tax . . . merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time. I know that these monsters are the result of fabulous industry and ingenuity, plugging up this hole and casting out that net, against all possible evasion; yet at times I cannot help recalling a saying of William James about certain passages of Hegel: that they were no doubt, written with a passion of rationality; but that one cannot help wondering whether to the reader they have any significance save that the words are strung together with syntactical correctness." J. Learned Hand, *Thomas Walter Swan*, 57 Yale L.J. 167, 169 (1947).

We quote Judge Hand to illustrate a point: Our income tax laws are a maze of incomprehensible gibberish to the average citizen and taxpayer. It is beyond comprehension that the Court should permit prosecution thereof to assume a similar posture. To uphold the Government's action in the case at bar is to encourage further prosecutions purportedly aimed at casting out the net against all possible evasion, but devoid of reality and rationality. To put it bluntly: The Government should be discouraged from this type of prosecution which too readily can deteriorate into a persecution, and which could be extended to include all of us.

And finally, to conclude, it is respectfully urged that the Court review the concurrent sentence doctrine in the light of mootness as delineated by *Sibron* v. *United States*, supra, and the problem of adverse collateral legal consequences as suggested by *Benton* v. *United States*, supra; that the conspiracy conviction be reversed as not comporting with *Grunewald* v. *United States*, supra, and its predecessors; that the limits of the federal crime of conspiracy be defined by the Court; and that the false return conviction be vacated because of the introduction of improper evidence, improper joinder, and spillover.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
MARCH TERM, 1973

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

A. HENRY TAGER,
Defendant-Appellant.

No. 72-1832

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D. C. No. KC-CR-1458)

Before PHILLIPS, SETH and DOYLE, Circuit Judges

DOYLE, Circuit Judge.

(Filed May 17, 1973)

Defendant-appellant seeks reversal of judgments of conviction on two counts of an indictment charging him with income tax violations. The original indictment contained three counts. In the first of these the defendant-appellant was charged with the filing of a false income tax return for the calendar year 1963, contrary to 26 U.S.C. § 7206(1). In Count II he was charged with filing a false income tax return for the calendar year 1964. However, in Count III the allegation was that contrary to 18 U.S.C. § 371, commencing on or about January 1, 1962, and continuing to June 16, 1971, a conspiracy existed between the defendant and one Robert C. Jones in that they unlawfully, knowingly and wilfully conspired with each other to defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service in the ascertainment, com-

putation, assessment and collection of income taxes. This count also maintains that as part of the conspiracy the defendants agreed to file false tax returns for certain corporations including their law partnership, and they also agreed that they would fail to file tax returns for certain other corporations for 1963 and would fail to file returns for their law partnership for 1963 and 1964; that they would engage in the purchase and sale of securities in the names of these corporations in such a way as to make the transaction difficult to identify so that taxes could be charged in respect to them.

There were a number of overt acts alleged to have occurred from January 2, 1964 to April 18, 1966. Before trial, however, an amended indictment was filed setting forth later overt acts which were apparently designed to avoid the five-year statute of limitations which would be applicable rather than the six-year period provided in 26 U.S.C. § 6531. The later overt acts described conversations with Internal Revenue Service agents which were alleged to have occurred in 1966 and 1968. The government's theory with respect to these was that there were omissions of fact in these meetings and that they were part of the conspiracy to conceal the facts as to appellant's income and impede the government officials in obtaining information.

Trial was held on May 23, 1972 and the jury found defendant not guilty on Count I. It returned verdicts of guilty on Counts II and III.

Most of the defendant-appellant's contentions revolve around Count III, the conspiracy, and we shall take up these arguments at least in a general way. But, as we view this case, the aspect which is important is the evidence having to do with Count II which alleges tax fraud in connection with the filing of the defendant's return for

the year 1964 because the sentences were ordered to run concurrently—hence if the judgment on Count II is upheld, the conspiracy issues are rendered moot.

The allegation in Count II is that the return reported income from salary in the amount of $7,500.00, income from interest in the amount of $19.55, income from partnership in the amount of $23,590.87 and income from business in the amount of $12,536.80. Count II further alleges that the defendant well knew and believed that he received a substantial income in addition to that reported. On this subject little proof was needed because the defendant stipulated that during 1964 he received 18 checks totaling more than $34,000.00 from Policy Budget Plan, Inc. and that these were received on his own account and not for company purposes. The defendant, however, claimed that he borrowed these funds and that they constituted a loan from the company. In further support of this allegation a disbursement journal of a company called Policy Budget Plan, Inc. was introduced. This company had been engaged in the business of making loans to finance the premiums for insurance sold by the National Mutual Insurance Company. The defendant and a Mr. Ewing operated this company as equal owners. The disbursement journal was identified by Ewing, the former president of the company, as a book of original entry used to enter all checks used for expenses, salaries, etc. In it all of the checks were listed and were summarized once each month. Numerous checks were issued to the defendant-appellant. These totaled in excess of $27,000.00 for the month of January 1964 alone. Included was a check for $4,500.00 issued to a Buick company for an automobile, a 1963 Buick Riviera which was for the use of defendant-appellant. It was shown that he subsequently made a loan and pledged this car as security. Defendant-appellant maintained, as we have noted above, that these

withdrawals were in fact loans. But the disbursement journal did not bear this out. One withdrawal in the amount of $6,500.00 showed that it was a loan, but none of the other withdrawals were so described. The final result was that numerous withdrawals found their way to the defendant-appellant either as cash payments or deposits in his account.

There is no evidence whatever in corroboration of appellant's contention that the payments were loans, and thus the jury was free to infer that appellant was siphoning off income. The evidence was adequate to justify the jury's conclusion that appellant received substantial sums in excess of the income reported since none of these advances or withdrawals were reported by him.

It follows that the evidence supports the elements alleged in Count II. We make this determination in a light favorable to the government giving it the benefit of all reasonable inferences sustaining the verdict. Glazerman v. United States, 421 F.2d 547 (10th Cir.), *cert. denied*, 398 U.S. 928 (1970); Bailey v. United States, 410 F.2d 1209 (10th Cir. 1969); Thomas v. United States, 409 F.2d 730 (10th Cir. 1969).

We recognize that under the statute, 26 U.S.C. § 7206 (1), the evidence must establish that the defendant wilfully falsified his tax returns as to material matters,[1] *see* United

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1. 26 U.S.C. § 7206(1) provides:

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

* * *

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution

States v. Lodwick, 410 F.2d 1202, 1205-6 (8th Cir.), *cert. denied,* 396 U.S. 841 (1969); Gaunt v. United States, 184 F.2d 284, 288 (1st Cir. 1950), and that the failure to file a correct return does not establish fraud since the omission or inaccuracy must relate to a knowingly material matter. Knowles v. United States, 224 F.2d 168, 170 (10th Cir. 1955). The section in question prohibits affirmative false statements and also knowing and wilful omission of material matter. *See* Conford v. United States, 336 F.2d 285 (10th Cir. 1964). *See also* United States v. Jernigan, 411 F.2d 471, 472-73 (5th Cir.), *cert. denied,* 396 U.S. 927 (1969); Siravo v. United States, 377 F.2d 469, 472-3 (1st Cir. 1967); Edwards v. United States, 375 F.2d 862, 864-65 (9th Cir. 1967).

Finally, knowing and wilful falsification may be inferred from repetitious omissions of items of income.

The record in the case at bar establishes a pattern of conduct showing a flagrant disregard for the income tax laws.

We perceive no error in the court's receiving Exhibit 13-B, the general ledger of Policy Budget Plan, Inc. which is referred to above. It is argued that this is double entry book of account and that it was only partially completed. However, the government utilized it only for the purpose of showing the checks drawn for the month of January amounting to $22,515.75 plus the check to the Buick company in the amount of $4,550.00. This book treated all of the checks drawn to appellant in the same manner, none of them having been posted as loans receivable and, therefore, the book was relevant as raising an inference that all of the checks were income and none were loans.

In view of the close relationship which the appellant had with the Policy Budget Company, there is no merit

in his argument that this journal is not admissible simply because every last entry was not put in it. The important thing is that it is competent under the shop-book statute, 28 U.S.C. § 1732, and that it constitutes an admission against appellant.

The remaining issues pertain to Count III. Thus, it is maintained that the evidence was insufficient to support the guilty verdict on the conspiracy count; that the prosecution was barred by the statute of limitations; that Fifth Amendment privilege against self-incrimination applied to certain of the overt acts. The final overt acts consisting of conversations with the Internal Revenue agents in 1966 and 1968 were, according to appellant, added in the amended indictment simply for the purpose of extending the statute of limitations, and it contends that these were merely attempts to conceal the conspiracy and thus it could not effectively toll the statute of limitations.

Finally, it is maintained that the instruction relative to the statute of limitations was incomplete and improper and did not comply with the requisites of Grunewald v. United States, 353 U.S. 391 (1957).

Much space and effort have been devoted to the alleged invalidity of the conviction on Count III, whereas the Count II conviction is not seriously disputed. We have concluded that the conviction on Count II was entirely valid and so it is unnecessary to consider the several points raised in connection with Count III of the indictment because in such circumstances it is not relevant to consider the validity of the judgment on Count III since the sentences imposed were ordered to run concurrently. Thus, in Lawn v. United States, 355 U.S. 339 (1958), the defendant was convicted on ten counts, but on appeal contested the sufficiency of the evidence on two of the counts, notwithstanding that the sentences were ordered to run concurrently. The Supreme Court said:

> Lawn also contests the sufficiency of the evidence to support the verdicts against him on Counts 7 and 9, but since the sentences upon those counts run concurrently with the sentence on Count 10, which we have found sustained by the evidence, it is unnecessary for us to consider those contentions. Sinclair v. United States, 279 U.S. 263, 299, 49 S.Ct. 268, 273, 73 L.Ed. 692; Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774; Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489.

355 U.S. at 359. *See also* Page v. United States, 356 F.2d 337 (9th Cir. 1966), wherein the court said:

> It has been held time and again that where, on appeal, a conviction on one count is found to be valid, the appellate court will not look into the validity of convictions on other counts carrying sentences concurrent with that of the valid conviction. See Lawn v. United States, 355 U.S. 339, 359, 78 S.Ct. 311, 2 L.Ed.2d 321; Sinclair v. United States, 279 U.S. 263, 299, 49 S.Ct. 268, 73 L.Ed.2d 692; Mendez v. United States, 9 Cir., 349 F.2d 650, 652; Head v. United States, 9 Cir., 346 F.2d 194, 196; Brothers v. United States, 9 Cir., 328 F.2d 151, 157, and cases therein cited.

356 F.2d at 338.

Our court has also applied this principle. This was in Baca v. United States, 383 F.2d 154 (10th Cir. 1967). We there said:

> Even if we were to hold that the eighteen year sentence imposed on Count IV was void because Baca was not arraigned on that count, he would not be entitled to relief under 28 U.S.C. § 2255 since we conclude that the remaining sentences are clearly valid. Where the conviction on one or more counts

> of a multi-count indictment is upheld, an appellate court need not determine the validity of convictions on other counts carrying sentences concurrent with that of the valid convictions. See Page v. United States, 356 F.2d 337, 338 (9 CA 1966) and cases cited therein. We find no error in the trial court's denial of appellant's motion.

383 F.2d at 157.

There is no indication that the alleged errors with respect to Count III in any way affected the conviction on Count II. *See* Page v. United States, *supra*. Hence, review of the conviction on Count III is wholly unnecessary.

The judgment is affirmed.

APPENDIX B

MAY TERM—JULY 5, 1973

Before Honorable Orie L. Phillips, Honorable Oliver Seth, and Honorable William E. Doyle, Circuit Judges

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

A. HENRY TAGER,
Defendant-Appellant.

No. 72-1832

This matter comes on for consideration of the Petition for Rehearing filed by the Defendant-Appellant, A. Henry Tager, in the captioned case.

Upon consideration whereof, the Petition is denied.

Howard K. Phillips, Clerk
By /s/ Robert L. Hoecker
Chief Deputy Clerk

A true copy
Teste
Howard K. Phillips
Clerk, U. S. Court of Appeals, Tenth Circuit
By /s/ illegible
(Seal) Deputy Clerk

SUPREME COURT, U. S.

FILED

OCT 23 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-393

A. HENRY TAGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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E. The denial of petitioner's motion for summary reversal pursuant to 18 U.S.C., Federal Rules of Criminal Procedure, Rule 52 (b) by the United States Court of Appeals for the Tenth Circuit and said Court's decision affirming petitioner's convictions below, in light of the admission of government exhibit No. 154 in evidence, conflicts with the prior decisions of this Court and decisions of various of the Courts of Appeal as to the proper interpretation of 18 U.S.C., Federal Rules of Criminal Procedure, Rule 52 (b), and the duty imposed upon the courts by said rule; such actions constitute such a departure from the accepted and usual course of judicial proceedings, and a sanction of such a departure by the trial court, as to call for the exercise of this Court's power of supervision; and petitioner was so prejudiced by the admission of said exhibit as to require reversal of his conviction under both trial counts II and III.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-393

A. HENRY TAGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL STATEMENT

Pursuant to Rule 24 (5) of the Rules of the Supreme Court of the United States, petitioner respectfully submits the within Supplemental Brief calling the Court's attention to intervening matter not available to him in sufficient time prior to the filing of his Petition for Certiorari to permit inclusion or adequate treatment therein. As stated at Point E of the Addendum to the Petition heretofore filed, said matter was belatedly discovered by independent counsel subsequent to the denial of petitioner's petition for rehearing in the Tenth Circuit Court of Appeals, and concerns highly inflammatory summaries offered and received at trial which did not conform to the government's evidence.

Petitioner respectfully submits that the highly inflammatory and prejudicial nature of the subject summary evidence raises a serious additional question to be presented for review, and for the reasons herein stated, requires reversal of the convictions herein pursuant to Rule 52 (b) of the Federal Rules of Criminal Procedure.

ADDITIONAL QUESTION PRESENTED BY INTERVENING MATTER

E. WHETHER THE DENIAL OF PETITIONER'S MOTION FOR SUMMARY REVERSAL PURSUANT TO 18 U.S.C., FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 52 (b) BY THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND SAID COURT'S DECISION AFFIRMING PETITIONER'S CONVICTIONS BELOW, IN LIGHT OF THE ADMISSION OF GOVERNMENT EXHIBIT NO. 154 IN EVIDENCE, CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT AND DECISIONS OF VARIOUS OF THE COURTS OF APPEAL AS TO THE PROPER INTERPRETATION OF 18 U.S.C., FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 52 (b), AND THE DUTY IMPOSED UPON THE COURTS BY SAID RULE; WHETHER SUCH ACTIONS CONSTITUTE SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND A SANCTION OF SUCH A DEPARTURE BY THE TRIAL COURT AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION; AND WHETHER PETITIONER WAS SO PREJUDICED BY THE ADMISSION OF SAID EXHIBIT AS TO REQUIRE REVERSAL OF HIS CONVICTION UNDER BOTH TRIAL COUNTS II AND III.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18, Federal Rules of Criminal Procedure:

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

United States Code, Title 18:

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

United States Code, Title 26:

§ 7206 (1) Fraud and false statements-declarations under penalties of perjury

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852.

ADDITIONAL REASON FOR GRANTING THE WRIT PRESENTED BY INTERVENING MATTER

E. THE DENIAL OF PETITIONER'S MOTION FOR SUMMARY REVERSAL PURSUANT TO 18 U.S.C., FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 52 (b) BY THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND SAID COURT'S DECISION AFFIRMING PETITIONER'S CONVICTIONS BELOW, IN LIGHT OF THE ADMISSION OF GOVERNMENT EXHIBIT No. 154 IN EVIDENCE, CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT AND DECISIONS OF VARIOUS OF THE COURTS OF APPEAL AS TO THE PROPER INTERPRETATION OF 18 U.S.C., FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 52 (b), AND THE DUTY IMPOSED UPON THE COURTS BY SAID RULE; SUCH ACTIONS CONSTITUTE SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND A SANCTION OF SUCH A DEPARTURE BY THE TRIAL COURT, AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION; AND PETITIONER WAS SO PREJUDICED BY THE ADMISSION

OF SAID EXHIBIT AS TO REQUIRE REVERSAL OF HIS CONVICTION UNDER BOTH TRIAL COUNTS II AND III.

Petitioner in these proceedings stands convicted under two counts of a three-count indictment, Trial Count II charging the subscribing and filing of a false United States Income Tax Return for the calendar year 1964, in violation of 26 U.S.C., § 7206 (1), and Trial Count III charging violation of 18 U.S.C., § 371, in that from on or about the first day of January, 1962, and continuously thereafter up to June 16, 1971, petitioner and an unindicted co-conspirator did unlawfully, knowingly and willingly conspire with each other and with other unknown persons to defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service in the ascertainment, computation, assessment and collection of income taxes. Among other things, it was charged that petitioner and the unindicted co-conspirator agreed and conspired to file United States tax returns which were false and fraudulent with reference to the sale of securities, and that such returns were in fact filed; that they would buy and sell securities in the names of certain corporations, the petitioner and their law partnership, buying in one name and selling in another so as to make the transactions difficult to trace; and that they would not make available adequate records to the Internal Revenue Service, and did not make such records available.

At the trial, a summary exhibit, Government Exhibit No. 154, was offered and received in evidence, over objection, after testimony by the revenue agent who had prepared it that it represented an accurate summary of exhibits that had theretofore been admitted in evidence. Its ostensible purpose was to summarize properly received

evidence relating to alleged unreported securities transactions by petitioner. It was a pencil schedule which was obviously prepared before trial, and included a great number of summarized transactions which were never received in evidence. Rather than prepare a new schedule for introduction, reflecting only a summary of those items which had actually been received, the government apparently merely erased those items which had not been properly received. However, to the great prejudice of defendant, this erasure was of such poor quality that the entire schedule was wholly readable. The schedule, as received, contained at least 15 summaries of evidence which was never properly received, and which aggregate in excess of $596,000 in allegedly unreported security transactions attributable to petitioner. A listing of the wholly readable summaries included in the exhibit, which are unsupported by any evidence received at trial, is set forth in schedule form, appearing at page 1 of the Appendix hereto.

The petitioner herein stood charged, and was subsequently convicted of two offenses, one involving the filing of a false income tax return, and the other involving an alleged conspiracy involving the purchase and sale of securities in the names of various entities in such a way as to make the transactions difficult to identify. It is almost impossible to perceive that the jury would not attach great significance to these wrongfully summarized and unsupported transactions totalling more than $596,000 in reaching its decision on *both* findings of guilt. A goodly number of the summarized but unsupported transactions allegedly occurred during the year in which the petitioner was charged with filing a false return. All purportedly occurred during the existence of the alleged conspiracy. Petitioner respectfully submits that the placing of such suggestions before the jury in summary form, without a shred of evidence in the record proper to support them,

is enough in and of itself to give rise in the minds of the jury to an almost irresistible impulse to suspect the propriety of all of appellant's motives and actions in the making and filing of his return for 1964, and to create a like impulse of suspicion and guilt when considering the existence or non-existence of the alleged conspiracy. It carries with it the unmistakable yet wholly unsupported inference of wrongdoing on the part of an accused at a time when he is charged with making a false return and of engaging in a conspiracy; and unsupported by record evidence, is so prejudicial to the rights of the accused as to leave no doubt of its adverse influence upon the jury.

Wright, Federal Practice and Procedure: Criminal Section 856, suggests that 18 U.S.C., Federal Rules of Criminal Procedure, Rule 52 (b) is ordinarily invoked by counsel who, in preparing an appeal, discovers what he considers to be an error to which no objection was theretofore taken (*suggesting likewise however that the rule is not so limited, and may be invoked by an appellate court on its own motion, even if it was never raised by counsel*). Such was the case in the instant proceedings. The highly inflammatory and prejudicial form in which the government's aforementioned summary exhibit was received in evidence was discovered by independent counsel employed to thoroughly examine the record on appeal subsequent to the denial of petitioner's petition for rehearing by the Tenth Circuit Court of Appeals. The discovery came too late for inclusion or adequate treatment in petitioner's Petition for Certiorari herein, but was raised by Motion for Summary Reversal filed in the Tenth Circuit on August 16, 1973, and denied by said court on August 23, 1973. Said Motion sought the invocation by the court of appeals of the so-called "plain-error" rule afforded it by Rule 52 (b) providing that plain errors or defects affecting

substantial rights may be noticed by an appellate court, although not previously brought to its attention. Said rule is a restatement of prior law, as set forth in *U. S.* v. *Atkinson*, 297 U.S. 157, 56 S. Ct. 391, 80 L. Ed. 555 (S. Ct., 1936), viz:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings."

See also *Wiborg* v. *U. S.*, 163 U.S. 632, 16 S. Ct. 1127, 41 L. Ed. 289 (S. Ct., 1896).

It has been said that error is prejudicial unless the reviewing court can say, with fair assurance, that the jury's judgement was not swayed thereby. *Blackwell* v. *U. S.*, 244 F. 2d 423, *certiorari denied*, 355 U.S. 838, 78 S. Ct. 49, 2 L. Ed. 2d 50 (C.A. 8th, 1957), and that error cannot be disregarded on the basis of a mere conjecture that the jury did not hear what was said or draw from it a possible inference unfavorable to the defense. *Stewart* v. *U. S.*, 366 U.S. 1, 81 S. Ct. 941, 6 L. Ed. 2d 84 (S. Ct., 1961). Even the fact that there was sufficient competent evidence from which a jury could have found a defendant guilty is not decisive. *Kotteakos* v. *U. S.*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (S. Ct., 1946). See also *Bumper* v. *State of North Carolina*, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (S. Ct., 1968). An accused must not only be guilty of the offense of which he is charged and convicted but he must be tried and convicted according to proper legal procedures and standards; and it is no answer to the application of erroneous standards of law that the evidence is sufficient to support a verdict reached in accordance with the proper standards of law.

Wilson v. *U. S.*, 250 F. 2d 312 (C.A. 9th, 1957). Nor is the fact that the appellate court believes the defendant to be guilty enough to disregard the error as harmless. *Weiler* v. *U. S.*, 323 U.S. 606, 65 S. Ct. 548, 89 L. Ed. 495, 156 A.L.R. 496 (S. Ct., 1945).

Indeed, if error is sufficiently serious, there must be reversal even though the appellate court is "without doubt" that the defendant is guilty. *Bollenbach* v. *U. S.*, 326 U.S. 607, 66 S. Ct. 402, 90 L. Ed. 350 (S. Ct., 1946); *Meeks* v. *U. S.*, 163 F. 2d 598, 11 Alaska 378 (C.A. 9th, 1947). Nor can it be presumed that any cure to the error here presented was effected by the general instructions afforded by the trial court that the summary exhibit was to be considered by the jury in its deliberation as a summary of evidence admitted at trial. In *Krulewitch* v. *U. S.*, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790 (S. Ct., 1949), Mr. Justice Jackson observed that the "naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." Similarly, the Supreme Court in *Bruton* v. *U. S.*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (S. Ct., 1968) said:

> ". . . instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. . . It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless . . . there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

Even before the *Bruton* pronouncement by the Supreme Court, appellate courts reversed, despite curative instruc-

tions from the trial judge, where the error was so prejudicial that the appellate court could not be sure that the jury was not influenced by it, despite the instruction. *U. S.* v. *Bozza*, 365 F. 2d 206 (C.A. 2d, 1966); *U. S.* v. *Clarke*, 343 F. 2d 90 (C.A. 3d, 1965); *McMillian* v. *U. S.*, 363 F. 2d 165 (C.A. 5th, 1966); *U. S.* v. *Gordon*, 253 F. 2d 177 (C.A. 7th, 1958). As the court said in *Odom* v. *U. S.*, 377 F. 2d 853 (C.A. 5th, 1967):

> "The attempt to sanitize testimony by admonition may sometimes suceed, but its success will very often depend upon how virulent and diseased testimony was. . ."

Although the cases give the distinct impression that "plain error" is a concept appellate courts find impossible to define, save that they know it when they see it, *Jacobellis* v. *State of Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 1683, 12 L. Ed. 2d 793, 803 (S. Ct. 1964), there is ample justification in the prior decisions of this Court, and in the decisions of various of the courts of appeal to substantiate the clear conclusion that admission of the type of evidence complained of here was in fact plain error.

As pointed out in *U. S.* v. *O'Connor*, 237 F. 2d 466 (C.A. 2d, 1956) at 475, the Supreme Court has long recognized that the trial court is under a duty to scrutinize charts, summaries, schedules, etc., before they can be admitted into evidence, to insure that they fairly represent and summarize the evidence on which they are based. See *Costello* v. *U. S.*, 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (S. Ct. 1956). The Fifth Circuit has held hat in a prosecution for income tax evasion, the admission of government's exhibits which were computations of evidence of government's witnesses, where there were omissions, interpretations and discrepancies between the record and the ex-

hibit, was prejudicial error. *Steele* v. *U. S.*, 222 F. 2d 628 (C.A. 5th, 1955). *Fleminster* v. *U. S.*, 260 F. 2d 513 (C.A. 5th, 1958), was another Fifth Circuit income tax evasion case involving the wrongful use of summary schedules, in which the court struck down the government's contention that substantial accuracy is sufficient to meet the requirements for a summary. In addition, in *Fleminster*, the court held that it was prejudicial for the jury to be confronted with the wrongful schedules not only as respects the count to which they referred, but likewise as to other counts against the defendant being tried concurrently therewith. In *United States* v. *Altruda*, 224 F. 2d 935 (C.A. 2d, 1955), another income tax evasion case, the Second Circuit held that it was reversible error to admit in evidence the government's analysis of net worth increase and computation of unreported income where it did not conform to the government's evidence. *United States* v. *Kiamie*, 258 F. 2d 924 (C.A. 2d, 1958), was another Second Circuit tax evasion case involving the offer of summary schedules. In that case, the summary was offered by the defendant, and because it did not conform to the evidence actually received at trial, was rejected by the trial court, and its ruling was upheld by the Court of Appeals. Even the Tenth Circuit itself has recognized that "When such a proposed exhibit contains evidence not otherwise in the record, it loses its identity as a summary and is not admissible." See *Oertle* v. *United States*, 370 F. 2d 719 (C.A. 10th, 1966) at 728.

A concluding reference of even more importance than the individual remedy afforded petitioner or any defendant by the so-called "plain error" rule is aptly supplied by *Wright, Federal Practice and Procedure*: Criminal Sec. 856, in referring to its importance to all individuals, including the courts, at page 374:

> "Clearly a part of the purpose of the plain error rule is to protect the defendant. If a serious injustice was done him, it should be remedied. . . But this does not exhaust the purpose of the rule. Instead the court is to act if there were errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings. *U. S.* v. *Atkinson,* 1936, 80 L. Ed. 555. It is important that justice be done but it is also important that justice seem to be done. It is not a miscarriage of justice to convict a guilty man but if he is convicted in a way inconsistent with the fairness and integrity of judicial proceedings, then the courts should invoke the plain error rule in order to protect their own public reputation."

Petitioner respectfully submits that for the preservation of fairness, integrity and the public reputation of our judicial proceedings, as well as for other reasons heretofore stated, the Tenth Circuit ought properly to have reversed petitioner's convictions under both coun[t] herein pursuant to its power so to do derived from 18 U.S.C., Federal Rule of Criminal Procedure, Rule 52 (b); and that its failure to do so is in conflict with the prior decisions of this Court and of various of the courts of appeal as to the proper interpretation of 18 U.S.C., Federal Rules of Criminal Procedure, Rule 52 (b), and the duty imposed upon the courts by said Rule; and that its failure so to do constitutes such a departure from the accepted and usual course of judicial proceedings, and a sanction of such a departure by the trial court, as to call for the exercise of this Court's power of supervision.

These conflicts and abuses justify the grant of certiorari to review the decision below.

CONCLUSION

For the additional reasons stated, a writ of certiorari should issue to review the judgement and opinion of the Tenth Circuit.

Respectfully submitted,

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APPENDIX

SCHEDULE OF ERASED SUMMARIES REMAINING IN READABLE FORM ON GOVERNMENT EXHIBIT 154 WHEN ADMITTED IN EVIDENCE

1. Line 6, Page 1, contains a readable summarization of some $5,700 in 1963 security sales by A. Henry Tager purportedly reflected in Government Exhibit No. 59, being a copy of a cashier's check # 1002 for $5,700, dated 5-21-63 and a stockholders ledger sheet in the name of A. Henry Tager from Empire State Bank. Government Exhibit No. 59 was never identified or received in evidence. (T., Vol. IX 84)

2. Line 10, Page 1, contains a readable summarization of some $103,025.20 in 1962 sales by A. Henry Tager purportedly reflected by Government Exhibit No. 63, copies of customer ledger sheets of A.C. Allyn & Co. The only portion of Exhibit No. 63 offered or received (T. 664, 694) related to 1963 sales.

3. Line 10, Page 1, contains a readable summarization of some $144,077.21 in 1962 sales under the name of Salem Investment Company purportedly reflected in Government Exhibits 64 and 65, ledger sheets of A.C. Allyn & Co., a/c Salem Investment Co. Government Exhibits 64 and 65 were never identified or received in evidence. (T., Vol. IX 84)

4. Line 11, Page 1, contains a readable summarization of some $7,453.51 in 1963 sales under the name of Salem Investment Company purportedly reflected in Government Exhibit No. 64, ledger sheets of A.C. Allyn & Co., a/c Salem Investment Co. Government Exhibit No. 64

was never identified or received in evidence. (T., Vol. IX 84)

5. Line 17, Page 1, contains a readable summarization of some $13,073.60 in 1962 sales by A. Henry Tager purportedly reflected on Government Exhibit No. 75, customer ledger sheets from Barrett, Fitch, North & Co. That part of Exhibit No. 75 offered and received (T., 695) relates to 1963 sales.

6. Line 22, Page 1, contains a readable summarization of some $7,403.24 in 1963 sales under the heading "Sugar Creek National Bank" purportedly reflected on Government Exhibit No. 82, copies of customer ledger sheets of B.C. Christopher & Co. a/c Sugar Creek National Bank, Civic Plaza National Bank, Country Club Bank and Roeland Park Bank. Exhibit No. 82 was never identified or received in evidence. (T., Vol. IX 85)

7. Line 23, Page 1, contains a readable summarization of some $46,824.76 in sales under the heading "Sugar Creek National Bank" purportedly reflected on Government Exhibit 116, copies of Regulation "U" certificates filed with Sugar Creek National Bank. Exhibit No. 116 was never identified or received in evidence. (T., Vol. IX 88)

8. Line 25, Page 1, contains a readable summarization of some $41,696.08 in 1963 sales by A. Henry Tager purportedly reflected on Government Exhibit No. 83, copies of customer account sheets of T.C. Henderson & Co., Inc. a/c A. Henry Tager Cust. David Charles Tager. The authenticity of these account sheets as business records of T.C. Henderson & Co., Inc. was stipulated to by defendant's counsel, but Exhibit 83 itself was never identified or received in evidence. (T., Vol. IX 83)

9. Line 32, Page 1, contains a readable summarization of some $114,050.20 in 1963 sales by A. Henry Tager, purportedly reflected on Government Exhibit No. 102, copies of customer ledger sheets of Dean, Witter & Co., a/c Jones and Tager. Exhibit No. 102 was never identified or received in evidence. (T., Vol. IX 87)

10. Line 37, Page 1 contains a readable summarization of $34,544.05 in 1964 sales by A. Henry Tager purportedly reflected in Government Exhibit No. 102, copies of customer ledger sheets of Dean, Witter & Co., a/c Jones and Tager. Exhibit No. 102 was never identified or received in evidence. (T., Vol. IX 87)

11. Line 9, Page 2, contains a readable summarization of some $2,512.67 in 1962 sales by A. Henry Tager purportedly reflected in Government Exhibit No. 104, copies of customer ledger sheets of Strauss, Blosser & McDonnell, a/c A. Henry Tager, Cust. for David C. Tager. Exhibit No. 104 was never identified or received in evidence. (T., Vol. IX 87)

12. Line 11, Page 2, contains a readable summarization of some $487.16 in 1963 sales by A. Henry Tager purportedly reflected in Government Exhibit No. 147, copies of customer ledger sheets of Golkin, Bombeck & Co., two accounts # 8308-1 and # 8308-2 in the name of A. Henry Tager. Exhibit No. 147 was never identified or received in evidence. (T., Vol. IX 90).

13. Line 12, Page 2, contains a readable summarization of some $23,903.05 in 1964 sales by A. Henry Tager purportedly reflected in Government Exhibit No. 147,, copies of customer ledger sheets of Golkin, Bombeck & Co., two accounts, # 8308-1 and # 8308-2 in name of A. Henry Tager. Exhibit No. 147 was never identified or received in evidence. (T., Vol. IX 90)

14. Line 12, Page 2, contains a readable summarization of some $29,996.65 in 1964 sales under the heading "Sugar Creek National Bank" purportedly reflected in Government Exhibit No. 110, copies of brokers' statements, confirmation slips of Golkin, Bombeck & Co., from Sugar Creek National Bank. Exhibit No. 110 was never identified or received in evidence (T., Vol. IX 87).

15. Line 14, Page 2, contains a readable summarization of some $33,024.69 in 1964 sales under the heading "Sugar Creek National Bank" purportedly reflected in Government Exhibit No. 111, copies of brokers' statements, confirmation slips of H.O. Peet & Co., from Sugar Creek National Bank. Exhibit No. 111 was never identified or received in evidence. (T., Vol. IX 87)

JULY TERM—AUGUST 23, 1973

Before Honorable Orie L. Phillips, Honorable Oliver Seth, and Honorable William E. Doyle, Circuit Judges

No. 72-1832

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

A. HENRY TAGER,
Defendant-Appellant.

(Filed August 23, 1973)

This matter comes on for consideration of appellant's motion for summary reversal and appellee's response thereto in the captioned cause.

Upon consideration whereof, the appellant's motion is denied.

/s/ Howard K. Phillips
Clerk

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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

A. HENRY TAGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-8A) is reported at 479 F. 2d 120.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1A) was entered May 17, 1973, and a petition for rehearing was denied July 5, 1973 (Pet. App. 9A). Mr. Justice White extended petitioner's time for filing a petition for a writ of certiorari to September

3, 1973, and the petition was filed August 31, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict on the conspiracy count.

2. Whether prosecution of the conspiracy count was barred by the statute of limitations and whether the jury was properly instructed on that subject.

3. Whether the court below erred in applying the concurrent sentence doctrine so as to make unnecessary review of the conviction on the conspiracy count.

4. Whether the trial court erred in trying the substantive and conspiracy counts together.

5. Whether the trial court erred in admitting in evidence, on the substantive count, Government Exhibit 13-A, a cash disbursement journal.

6. Whether petitioner's conviction on the conspiracy count should be reversed on the theory that the trial court committed plain error in the admission of Government Exhibit 154, where the issue was never raised in the trial court and was raised in the court of appeals only after the petition for rehearing had been denied.

STATUTES INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency there-

of in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Section 7206(1) of the Internal Revenue Code of 1954, 26 U.S.C. 7206(1), provides:

Any person who—

(1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter * * * shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT

After a jury trial in the United States District Court for the District of Kansas, petitioner was convicted of (1) filing a false income tax return for the calendar year 1964, in violation of 26 U.S.C. 7206(1); and (2) having unlawfully conspired to defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of

the Internal Revenue Service in the ascertainment, computation, assessment and collection of income taxes, in violation of 18 U.S.C. 371. The court sentenced petitioner to concurrent 30-month prison sentences on each count and assessed costs against him in the amount of $3,546.49.

The court of appeals found the evidence sufficient on the substantive count and found petitioner's other contentions respecting that count to be without substance. It thereupon affirmed the judgment of conviction, finding it unnecessary to reach petitioner's contentions relating to the conspiracy count, since the sentences were concurrent (Pet. App. 8A).

Since petitioner does not now attack the sufficiency of the evidence on the substantive count, we shall discuss here only the evidence relating to the conspiracy count.

The conspiracy indictment alleged that petitioner and Jones, a co-conspirator but not a defendant, conspired to defraud the United States by impeding and obstructing the Internal Revenue Service in ascertaining and assessing income taxes. It was alleged to be part of the conspiracy that petitioner and Jones would and did prepare and file false 1962 United States income tax returns of Town Realty Corp. ("Town"), Salem Investment Co., Inc. ("Salem"), and the Jones and Tager law partnership. It was further alleged that the conspirators would and did fail to file tax returns for Town and Salem for 1963; and would and did fail to file the Jones, Tager, and McDaniel law partnership returns for the years 1963

and 1964. It was further alleged that petitioner would and did buy securities in his name and in the name of Town, Salem, or the Jones and Tager partnership and sell them in another of those names, with the purpose of making the transactions difficult to trace. It was also alleged that it was part of the conspiracy that the participants would not and did not make available adequate records to Internal Revenue Service agents who attempted to determine the correct income of the various individuals and entities named in the indictment.

The conspiracy count alleged ten overt acts, including the signing of certain tax returns by Jones and petitioner. The only two overt acts which came within the five-year statute of limitations [1] were the following:

> i. On or about the twenty-ninth day of November, 1966, at his office in the Rialto Building in Kansas City, Missouri, defendant A. Henry Tager had a conversation with Special Agent

[1] Since the case went to the jury on the theory that a five-year statute of limitations applied, we concede here, for purposes of the present case, that the statute applicable to this case provides for a five-year period (18 U.S.C. 3282). However, it should be noted that Section 6531 of the Internal Revenue Code of 1954 (26 U.S.C. 6531), providing for the prosecution of "the various offenses arising under the internal revenue laws," establishes a six-year period of limitations for "offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner." Thus, in a conspiracy in which the government preserved the argument that its case arose "under the internal revenue laws," it would appear that a six-year statute of limitations applies.

Martin J. Broderick and Revenue Agent Marvin Fiant.

j. On or about the twenty-ninth day of October, 1968, at the office of the Internal Revenue Service Intelligence Division in Kansas City, Missouri, defendant A. Henry Tager participated in a conference attended by [certain named individuals].[2]

The evidence to support the verdict on the conspiracy count may be summarized as follows:

Petitioner became a law partner of Robert Jones in 1957, and their partnership continued until 1963, when it became Jones, Tager and McDaniel (Tr. 424). In addition to the law partnership, petitioner and Jones formed and owned all the stock of Town and Salem (Tr. 310, 425, 426).

The Jones and Tager partnership return for 1962 (Govt. Ex. 11) reported a loss on the sale of securities in the amount of $449,432.15 (Tr. 281-282). The total sales of securities reported on this return were $3,596,303.29 (Tr. 282). While breakdown of this total is not shown on the return, Jones and Tager had sales of $1,171,456.18, Salem had sales of $1,982,607.06, and other entities had the balance (Tr. 283-285). The accounting firm which prepared the return made the assumption, probably on the basis

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[2] Petitioner errs in the statement (Pet. 6) that the last overt act ("j") alleged in the conspiracy count was abandoned during oral argument before the court of appeals. What government counsel said was that the government was relying mainly upon overt act "i" and *if* that was insufficient as a matter of law, then overt act "j" was also insufficient.

of discussions with petitioner, that Salem was only a "shell," whose securities transactions actually represented the dealings of Jones and Tager (Tr. 285-287). The partnership return was signed by Robert Jones (Tr. 429), although all of the securities transactions were initiated and completed by petitioner, sometimes in his own name, sometimes in the name of the partnership, sometimes in the name of Town or Salem (Tr. 433-434).

The 1962 partnership return of Jones and Tager showed income of some $112,000 from the practice of law, which was wiped out by the alleged $447,000 loss on the sale of securities, resulting in a net loss of some $335,000 (Tr. 431; Govt. Ex. 11). Jones reported half of the alleged loss from the partnership, or $167,966.95, on his 1962 individual income tax return (Tr. 432).[3] Petitioner reported the other half on his 1962 individual income tax return (Tr. 759).

Jones also signed the 1962 income tax returns of Town and Salem (Tr. 426, 427-428). The Town return reported a loss on the sale of securities of $5,645.70 (Tr. 427), and the Salem return reflected no trading in securities (Tr. 428), although there were numerous transactions in securities that year in the name of Salem (Tr. 430).

On January 1, 1963, the law partnership of Jones, Tager and McDaniel came into existence (Tr. 306-

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[3] Jones was of the opinion that the losses from the purchase and sale of securities in 1962 were overstated on the partnership return, and that the actual losses were less (Tr. 452.)

307). Although no 1963 partnership return for this firm was ever filed (Tr. 49-50), one was prepared by an accountant, Franke, from information received from petitioner and from the accounting firm that prepared the 1962 returns (Tr. 341, 348). In 1963, some of the securities transactions were in the name of Salem, some in the name of petitioner, and some in the name of Jones and Tager (Tr. 345-346, 436-437). The unfiled 1963 partnership return stated a loss on the sale of securities of about $41,000, which was reflected in the distributive share of partnership income reported by the partners on their individual income tax returns (Tr. 758). When he came to prepare the 1963 partnership return, Franke had information that sales of securities totalled $1,071,899.98 and that purchases totalled only $222,-135.12; he was told by petitioner that he had lost about $40,000 on the purchase and sale of securities that year, so Franke estimated purchase prices for many of the stocks, some of which were bought or sold in the name of Town and National Mutual Insurance Co. (Tr. 381-382).

Neither Town nor Salem filed an income tax return for the year 1963 (Tr. 50-51). Although a 1964 partnership return of Jones, Tager and McDaniel—which showed no sales of securities—was prepared, it was never filed (Tr. 50, 346).

Near the beginning of their investigation of the criminal case, Treasury agents interviewed petitioner on November 29, 1966 (overt act "i") (Tr. 706, 822). At that time, the revenue agents were hav-

ing great difficulty tracing petitioner's transactions in securities and asked him for the names of the stockbrokerage houses with which he had done business. Petitioner gave the names of only six and never gave the names of any others, although the agents asked for such information (Tr. 707-708, 823). Later investigation disclosed many other brokers with whom petitioner had done business (Tr. 823; Govt. Ex. 154). At no time did petitioner furnish the agents with any records of his accounts with any stockbroker (Tr. 826).

On October 29, 1968, the agents conducted another interview with petitioner (overt act "j"). They asked him why he had not reported his securities transactions on his 1963 and 1964 income tax returns, and he replied that he felt he had lost more than he had gained and therefore did not think it necessary to report these figures (Tr. 710, 827). He said nothing about the way he was purchasing or selling securities, nor did he indicate the returns on which the transactions actually had been reported (Tr. 710).

Government's Exhibit 154 (see Tr. 693-701) is a tabulation showing the petitioner's purchases and sales of securities in 1962 and 1963 through fourteen stockbrokers with whom he was known to have done business. Each figure is keyed to the number of the government's exhibit (stockbrokers' records) from which it came. A recapitulation on page 3 shows that the securities sold in 1962 through these fourteen stockbrokers exceeded the sales reported by

$72,044.25, and that the securities thus sold in 1963 exceed sales reported by $348,855.53. Government's Exhibit 156 is an analysis of some 33,955 shares of stock (and certain bonds) which were bought in one name and sold by petitioner in another name in 1962 or 1963. (See Tr. 771-776.)

The defense adduced no evidence.

ARGUMENT

1. Contrary to petitioner's contention (Pet. 42-45), the evidence was plainly sufficient to support the verdict on the conspiracy count. Petitioner's devices to deceive the tax authorities were a fraud within the meaning of 18 U.S.C. 371. See *United States* v. *Klein*, 247 F. 2d 908 (C.A. 2), certiorari denied, 355 U.S. 924; *Schino* v. *United States*, 209 F. 2d 67 (C.A. 9), certiorari denied, 347 U.S. 937; *Kobey* v. *United States*, 208 F. 2d 583 (C.A. 9); cf. *Glasser* v. *United States*, 315 U.S. 60, 64, 66. That statute is "broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government" (*Haas* v. *Henkel*, 216 U.S. 462, 479), which is to be accomplished "by deceit, craft or trickery, or at least by means that are dishonest" (*Hammerschmidt* v. *United States*, 265 U.S. 182, 188; *United States* v. *Klein*, *supra*, 247 F. 2d at 916). The government need not show an actual financial or property loss in order to make a case under this section. See *Haas* v. *Henkel*, *supra*, 216 U.S. at 479-

480 and cases there cited; *Hammerschmidt* v. *United States, supra,* 265 U.S. at 188.

Moreover, the conspiracy alleged in the case at bar plainly was a continuing one. See *United States* v. *Klein,* 247 F. 2d 908 (C.A. 2), certiorari denied, 355 U.S. 924; *Forman* v. *United States,* 361 U.S. 416, 423-424; *Hyde* v. *United States,* 225 U.S. 347, 367; *United States* v. *Kissel,* 218 U.S. 601.

The government still, in 1973, does not know the income tax liability of petitioner and Jones for the years 1962 and 1963. In order to compute their income, it would be necessary to have a complete listing of all capital gains and losses realized from the sale of securities, and it is impossible to prepare such a complete listing. Petitioner has never furnished the government with any of his stock brokerage accounts, nor do the Treasury agents know to this day just how many stock brokers he did business with. The 1962 partnership return gives no breakdown at all of the securities transactions, but simply shows total sales of $3,596,303.29 and purchases of $4,039,009.11 (Govt. Ex. 11, p. 4). The Internal Revenue Service has never been able to verify those figures, although it is known that there were at least $72,044.25 of sales unreported (Govt. Ex. 154, p. 3). As for 1963, the predicament of the Service is even worse. For in that year it is known that the sales reported on the partnership return were understated by at least $348,855.53 (Govt. Ex. 154, p. 3).

The practice of dealing with a large number of stock brokers, some of them still probably unknown to the government, and of buying securities in the name of one person, partnership or entity and selling them in the name of another has effectively frustrated the Internal Revenue Service in its efforts to reconstruct the income of petitioner and Jones (Govt. Ex. 156). This continuous course of conduct was not the result of inadvertence or misunderstanding, but rather the result of a deliberate plan, carried out primarily by petitioner but known to, and acquiesced and participated in, by Jones.[4]

We submit that the proof was plainly sufficient to support the verdict finding petitioner guilty on the conspiracy count.

---

[4] Evidence of petitioner's guilty knowledge and intent is provided in the following testimony of McDaniel, petitioner's former law partner (Tr. 312):

> Q. * * * I understand you testified that you observed Mr. Tager signing checks.
>
> A. Yes, I've seen Mr. Tager sign many checks on many different corporations, on many different checkbooks, yes sir, I have.
>
> Q. Will you explain that more in detail?
>
> A. Sometimes he would have as many as twenty checkbooks. I have seen him write one check on one account payable to another account. A check on the other account payable to maybe two other accounts or three, or a check on three of them payable back to one, et cetera. I've seen a transaction where you make one payable to this one, another over here and another one back and to this one. I have inquired about why and what was going on. Some day there would be a time when the IRS would look this over, and he said, "I would like to see them follow that transaction."

2. There is no substance to the argument (Pet. 35-42) that prosecution of the conspiracy charge was barred by the statute of limitations and that the jury was improperly instructed on this subject. The government had to prove that there was an overt act committed within five years[5] of the date of the indictment, October 15, 1971, which act entailed more than a mere effort to cover up the fact that there had been a conspiracy, and which was designed to further the principal objective of the conspiracy. See *Grunewald* v. *United States*, 353 U.S. 391. There were two overt acts alleged within that five-year period (See, Statement, *supra*, pp. 5-6). Overt act "i", upon which we rely primarily, alleged that on or about November 29, 1966, at his office in Kansas City, Missouri, petitioner had a conversation with named Treasury agents. The proof showed that at this conference the revenue agents, having had great difficulty in tracing petitioner's transactions in securities, asked him for the names of the stockbrokerage houses with which he had done business. Petitioner gave the names of only six and did not indicate that there were any more, when there were in fact at least fourteen (Tr. 707-708, 823; Govt. Ex. 156.)

To constitute an overt act in furtherance of the conspiracy the jury had to find that petitioner's disclosure of only a few of his many stockbrokers was designed to accomplish the main objective of the

[5] See footnote 1, p. 5, *supra*.

conspiracy, *i.e.*, to impede and obstruct the Internal Revenue Service in its efforts to ascertain, assess and collect income taxes. *Grunewald* v. *United States*, *supra*. The jury was correctly instructed on this subject. Petitioner has set forth (Pet. 39-40) part of the court's instruction to the jury on this subject, but reference to the record (Supp. Tr. 273-274) discloses that more was said.[6] When the instruction is

---

[6] Immediately following the part of the charge quoted by petitioner (Pet. 39-40), the court continued as follows (Supp. Tr. 273-274):

> You are instructed that a conspiracy, once formed, continues to exist until (1) it has accomplished its manifest purpose and objectives, or (2), it has ceased by the withdrawal of the members of the conspiracy evidenced by a clear showing of the conspirators to withdraw and no longer be a part of the conspiracy.
>
> In this case the indictment alleges that the conspiracy was made up of only two persons, the defendant and the named but unindicted co-conspirator, Robert C. Jones. If you find that there was a conspiracy as charged but that either of the conspirators clearly manifested his intention to withdraw from the conspiracy and did in fact withdraw therefrom prior to the commission of either of the last two alleged overt acts, that is, I or J that I have referred to, then the conspiracy ceased to exist as of that moment because a person cannot conspire with himself. In such case, prosecution of the defendant would be barred by the statute of limitations and he could not be convicted of the offense charged in Count 3.
>
> However, if the withdrawal from the conspiracy did not take place until after the commission of one of the last two alleged overt acts, I or J, and you found that all the essential elements of the offense had been proved—proven to your satisfaction beyond a reasonable doubt, then you should find the defendant guilty of the offense charged in Count 3.

read in its context, it is an entirely proper and complete charge (Supp. Tr. 272-274). The jury could not have found petitioner guilty under these instructions without first finding that his conversation with the Treasury agents (less than five years before the return of the indictment) was designed to accomplish the main objective of the conspiracy.

The evidence warranted the jury's findings that the overt acts proved were in furtherance of the conspiracy. This conspiracy did not attain its objective when the returns were filed. That was but the first step in the continuing conspiracy to impede the Internal Revenue Service in its efforts to ascertain and assess the correct income taxes of the conspirators. Cf. *Forman* v. *United States*, 361 U.S. 416, 423-424. Since even as to the year 1962 (the returns for which were not filed until January 1964) the period of tax assessment for civil purposes had not expired at the time of the November 1966 conference (see 26 U.S.C. 6501), the conspirators still had a vital stake in keeping the conspiracy alive, and it did not in fact come to an end until Jones began to cooperate with the government in June 1971.

3. There is no merit to the argument (Pet. 14-35) that the court below erred in invoking the concurrent sentence doctrine. This Court has recently reaffirmed in the context of a direct appeal its holding in *Benton* v. *Maryland*, 395 U.S. 784, that the concurrent sentence rule should be preserved as a matter of proper judicial administration. *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16. While some

circuits, as petitioner points out, appear to be more likely than others to apply the concurrent sentence rule as a matter of discretion, we see no conflict which would warrant the granting of a writ of certiorari. All the circuits recognize that while a court may in its discretion ignore the concurrent sentence rule when it chooses to do so, it is not required to review each count of a multi-count conviction on which concurrent sentences are imposed, unless substantial collateral legal consequences result from the multiple convictions. Recognizing this principle, petitioner makes three arguments: (a) That under *Sibron* v. *New York*, 392 U.S. 40, serious collateral consequences are *always* present (Pet. 33); (b) that these consequences relate to state habitual criminal statutes, possibilities of probation or parole, the question of impeachment in future court proceedings, and the stigma of being convicted of two offenses rather than one (Pet. 34); and (c) that in this case petitioner, being an attorney, suffers the serious collateral consequence that after his expected disbarment from the practice of law he will find it more difficult to gain reinstatement to the bar with the unreviewed conspiracy conviction hanging over his head (Pet. 34-35). None of these arguments has merit.

(a) *Sibron* v. *New York*, *supra*, did not involve the concurrent sentence doctrine. In that case Sibron was sentenced to six months in prison for possession of heroin. He had served his sentence before the appeal reached this Court. Noting that Sibron "could not have brought his case to this Court for review

before the expiration of his sentence" (392 U.S. at 51-52), this Court held that the case was not moot. The situation in *Sibron* bears no resemblance to this case. No claim is made that petitioner's appeal was moot.

(b) It is obvious that such routine and universal collateral consequences as those relating to state habitual criminal statutes, possibilities of probation or parole, and the question of impeachment in future court proceedings are not sufficient to require courts to ignore the concurrent sentence rule. If it were otherwise, there could be no concurrent sentence rule.

(c) Petitioner's claim that he will someday be reinstated to the practice of law if he is guilty of only one felony rather than two (Pet. 34-35) is without substance. The fact is that petitioner has been found guilty of *five* felonies, not two. In another case, petitioner was found guilty of three felonies in the United States District Court for the District of Kansas: (1) conspiring to transport in interstate commerce a United States treasury bill with a face amount of $100,000, knowing it to be stolen, in violation of 18 U.S.C. 371; (2) receiving the same treasury bill, in violation of 18 U.S.C. 2315; and (3) transporting the same treasury bill, in violation of 18 U.S.C. 2314. The Tenth Circuit reviewed all three convictions, affirmed all three on May 14, 1973 (*United States* v. *Tager*, 481 F. 2d 97), and denied a petition for rehearing on August 28, 1973.[7] In these circumstances, the possibility that a reversal

[7] Petitioner filed a petition for a writ of certiorari in that case on October 26, 1973, No. 73-694.

of one of the five felony convictions would have a substantial effect on petitioner's chances of being readmitted to the practice of law is too remote to be worthy of consideration.

4. There is no substance to the argument (Pet. 45-49) that the trial court erred in trying the substantive and conspiracy counts together. The court acted well within its discretion in ordering these two indictments, which related to petitioner's income tax matters for the years 1962 through 1964, tried together. The pre-trial order spelled out the reasons as follows:

> *Baker* v. *United States*, 401 F. 2d 958 (C.A. D.C., 1968) presents an analogous factual situation. In *Baker*, the defendant was charged in nine counts, including willful evasion of income taxes (Counts 1 and 2); and conspiracy to defraud the Government and defeat collection of taxes (Count 9). The Court experienced little difficulty in sustaining the joinder of Counts 1 and 2 with Count 9, even though the Government chose to proceed on a specific item theory in proving the evasion counts. The Court stated:
>
> > 'The predominant consideration is whether joinder would serve the goals of trial economy and convenience; the primary purpose of this kind of joinder is to insure that a given transaction need only be proven once.' *Baker* v. *United States*, *supra*, at 971; see *James* v. *United States*, 416 F. 2d 467 (5th Cir. 1969).
>
> These goals of trial economy and convenience are persuasive here, since the Court is otherwise

> satisfied that the tests of Federal Rules of Criminal Procedure 8(a) have been met.
>
> From an examination of the contents of the two indictments, it is obvious that the transactions overlap and, as the Government has stated, the same witnesses will be called to give evidence in each case. Therefore, the Court will permit joinder of the indictments for trial. Of course, the defendant is free to renew his request for Rule 14 relief at some later time, should it appear he is prejudiced; however, at this time, no evidence of prejudice is discernible.

At no time did petitioner renew his request for relief under Rule 14, Fed. R. Crim. P.

5. Petitioner claims (Pet. 48-49) that the court below erred in holding that Government Exhibit 13-A, the cash disbursement journal of Policy Budget Plan, Inc., was properly admitted in evidence. The argument is without merit. It is true that, beginning sometime in March 1964, the book was not kept up to date in the usual course of business (Tr. 180-181), but the last entries in the book relied upon by the government were dated March 2, 1964 (see two checks bearing that date—Govt. Exs. 15 and 16). Up until that time the book had been kept in the usual course of business (Tr. 131). The book was therefore properly admitted under the "shop-book" statute, 28 U.S.C. 1732. The exhibit was much more than only "one-half of the bookkeeping system" (Pet. 48); it was the book of original entry. Each entry represented a credit to the cash account and an offsetting debit. Moreover, for the month of January 1964 the book shows a complete recapitulation of

checks drawn. Those drawn in favor of petitioner that month ($22,515.75), plus the check for petitioner's personal car ($4,550.00), total $27,065.75, and that is the amount shown on the recapitulation to be charged to *petitioner's account* and not to any "Loans Receivable" or other account (Tr. 147-149, 200-201). There is no reason to believe that checks drawn to petitioner in February 1964 or on March 2, 1964, would have been treated any differently from those drawn to him in January 1964.

6. Petitioner contends, finally (Pet. 53 and Supplemental Brief, *passim*) that "[i]nflammatory and prejudicial evidence not of record was made available to the jury during its deliberations." This contention is also without merit. Petitioner's complaint —made for the first time after the petition for rehearing was denied—refers to Govt. Ex. 154, which we have described *supra*, at pp. 9-10. It is a tabulation showing petitioner's purchases and sales of securities in 1962 and 1963; the recapitulation (Govt. Ex. 154, p. 3) shows that the securities sold exceeded sales reported by $72,044.25 in 1962, and by $348,855.53 in 1963. Petitioner claims that the original exhibit contained certain additional figures which were supposedly erased, but which were still visible on the original upon close examination, and that the jury may therefore have gotten the impression that there were substantial unreported sales of securities in addition to those claimed by the government. However, these erased figures do not appear on the xerox copies of Govt. Ex. 154 which went to the jury after the

original was turned over to counsel for petitioner at the trial (Tr. 687-690, 697, 698, 712-713). Although counsel made many objections to the exhibit (Tr. 687-690) and cross-examined at length the government witness who prepared it (Tr. 749-756), no objection was made on the ground now urged.

Petitioner's contention is in the nature of a motion for new trial on the ground of newly discovered evidence, and it must fail because (1) counsel could have discovered it at the trial,[8] and (2) it is not of such a nature as probably to result in an acquittal at a retrial. *United States* v. *Craft*, 421 F. 2d 693, 695 (C.A. 9); *United States* v. *Spencer*, 415 F. 2d 1301, 1304 (C.A. 7); *United States* v. *Gleeson*, 411 F. 2d 1091, 1094 (C.A. 10); *Lindsey* v. *United States*, 368 F. 2d 633, 634 (C.A. 9), certiorari denied, 386 U.S. 1025. Moreover, there is every reason to believe that none of the jurors ever saw the original of the exhibit. When they retired to deliberate, each juror had a xerox copy (Tr. 746; Supp. Tr. 288)—on which the erased figures did not show up—and there would have been no occasion for any of them to examine the original exhibit.

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[8] It is clear that the *original* was turned over to defense counsel for examination at the trial, because the xerox copies were not in existence at that time. See Tr. 687-690, 697, 698, 712-713.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER, 1973.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-393

A. HENRY TAGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The Petitioner, pursuant to the authority granted by Rule 24(4), Rules of the Supreme Court, hereby files his Reply Brief addressed to arguments first raised in the Brief for the United States in Opposition.

ARGUMENT

I.

The concession relating to overt act (j), made in argument before the Court of Appeals is misstated by the Government.

The Government in a footnote (Br. 6) makes the bold, unequivocal statement that the Petitioner erred in stating that the Government's counsel had abandoned the last overt act (j) alleged in the conspiracy count during oral argument before the Court of Appeals. It is claimed that Government counsel stated that the Government is relying on overt act (i), and if that act is insufficient as a matter of law, then overt act (j) is also insufficient. We appreciate the concession, but nevertheless deplore that there is a difference of opinion relating to what was said. We are referring to the footnote merely to bring to the Court's attention that the Government's assertion of alleged error on the part of Petitioner is disputed. Nevertheless, the Government has conceded, albeit indirectly, that overt act (j) cannot stand by itself if overt act (i) is insufficient.

II.

The Government has misconstrued Barnes v. United States.

The Government, while conceding a conflict among the Circuits relating to interpretation and application of *Benton* v. *Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), erroneously interpreted the recent case of *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16, 93 S.Ct. 2357, 37

L.Ed.2d 380 (1973) as reaffirming the concurrent sentence rule as a matter of proper judicial administration. It is true that in the footnote, and without further comment, this was said:

> "Although affirmance of petitioner's conviction on two of the six counts carrying identical concurrent sentences does not moot the issues he raises pertaining to the remaining counts, *Benton* v. *Maryland*, 395 U.S. 784 (1969), we decline as a discretionary matter to reach these issues. Cf. *United States* v. *Romano*, supra, 382 U.S. at 138."

However, there is no indication that this statement stems from full argument on the question, or that the conflict among the circuits was ever brought before the Court. There is no indication that Barnes had made the continued usefulness and vitality of the doctrine the central core of the appeal. It is difficult to believe that this comment should be construed to reach and dispose of this statement made by Justice Marshall in *Benton*:

> "* * * A stronger case for total abolition of the concurrent sentence doctrine may well be made in cases on direct appeal, as compared to convictions attacked collaterally by suits for post-conviction relief. Because of our disposition of this case, we need not reach this question." 395 U.S. at 793, footnote 11, and 89 S.Ct. at 2062.

It is of some significance that *United States* v. *Romano*, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210 (1965), cited in the *Barnes* footnote, antedates *Benton* by four years, and makes no mention of possible abolition of the doctrine of concurrent sentences, or the effect of adverse collateral legal consequences.

And, finally, addressing ourselves to the Government's contention that our reliance on *Sibron* v. *New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), is misplaced, we suggest that the Court has considered *Sibron* as one of the cases casting doubt on the continuing validity of the concurrent sentence doctrine. In *Benton*, the Court directed this question to be answered: "Does the 'concurrent sentence doctrine' enunciated in *Hirabayashi* v. *United States*, 320 U.S. 81, 105, 63 S.Ct. 1375, 87 L.Ed. 1774, and subsequent cases, have continuing validity in the light of such decisions as [other cases cited] and *Sibron* v. *New York*, 392 U.S. 40, 50-58, [20 L.Ed.2d 917, 927-932, 88 S.Ct. 1889]?"[1]

Barnes does not answer this question. It is still an open one.

III.

The Government has misrepresented the status of its alleged tax claim against the Petitioner.

Aliunde the record, the Government asserts that it still does not know the income tax liability of the Petitioner. This does not comport with the facts. On October 16, 1973, the Government filed a civil action against the Petitioner claiming a tax liability of $474,825.00 plus interest and costs.[2] While the Petitioner claims nothing is owed, the Government is in error in making this statement (Br. 11).

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1. 395 U.S. at 787.

2. *United States* v. *Tager*, in the United States District Court for the Western District of Missouri, Civil Action No. 73-CV-554-W-2.

IV.

The Government has acted unfairly and in derogation of Petitioner's rights in referring to another unresolved pending case of Petitioner in order to avoid the impact of the collateral consequences rule.

We strenuously object to the tactics of the Government in referring to another case before the Court involving the Petitioner (Br. 17).[3] It theorizes that the collateral consequences rule is of little help to Petitioner since he has been convicted of five felonies instead of two. The pre-judging of the merits of the other case is completely unjustified, is a tactic of doubtful integrity, and should be ignored by the Court. The question of the continuing validity of the concurrent sentence doctrine should not be hinged to the merits of another unresolved case, nor do the Government's assertions answer the vital question of whether any person should stand convicted of an invalid criminal judgment.

V.

The Government has deliberately misconstrued the impact and consequences of conflicting decisions among the Circuits.

The Government's arguments relating to the conflict among the circuits deserves comment. It adheres to the rule of discretion, but admits that some circuits are more prone to ignore the concurrent sentence rule than others. The Government's concession is laudable, although a reading of the cases cited in Petitioner's Petition reveals that the concession is rather modestly put since the various circuits

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3. *Tager* v. *United States*, October Term, 1973, No. 73-694.

apply the rule of discretion over an extremely wide spectrum, that is, liberally, with a great deal of caution, or always. The circuits have also opined that the doctrine of concurrent sentences is either dead, very much alive, or somewhere in between.

We suggest that the Government's concession impels full reconsideration of the doctrine.

VI.

The Government's defense of Instruction No. 19 is insufficient.

The Government appears to recognize the insufficiency of Instruction No. 19 (Pet. 39-40), and the obvious fact that the jury was not instructed or permitted to make any findings relating to whether overt acts (i) and (j) were in furtherance of the conspiracy or efforts to conceal it.[4] This appears to be fatal error under *Grunewald* v. *United States*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957). In an effort to blunt the thrust of *Grunewald*, the Government asserts that the Petitioner had failed to include another instruction (Br. 14), and conveys the impression that only part of Instruction 19 was set out by the Petitioner. This is not true. The instruction which followed No. 19 was a complete and separate instruction, and advised the jury on the law relating to withdrawal from a conspiracy. It had nothing to do with whether or not overt acts (i) and (j) related to acts in furtherance or in concealment of the alleged conspiracy. Thus, the Government's remarks with respect thereto are inappropriate and irrelevant.

---

4. Overt acts (i) and (j) had to be proved in order to avoid the bar of the Statute of Limitations.

CONCLUSION

Petitioner respectfully renews his request that the Court review the concurrent sentence doctrine in the light of mootness as delineated by *Sibron* v. *New York*, supra, and the problem of adverse legal consequences as suggested by *Benton* v. *United States*, supra; that the conspiracy conviction be reversed as not comporting with *Grunewald* v. *United States*, supra, and its predecessors; and for such other and further relief as requested in the original Petition for Certiorari filed herein.

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PETITION FOR REHEARING ON ORDER DENYING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Additional Reasons for Granting the Writ Presented by Intervening Matter—

1. Where the petitioner's proven participation in alleged overt acts in furtherance of a conspiracy amounted to nothing more than acts of silence and failure to disclose information which would otherwise constitute valid exercises by him of his Fifth Amendment rights against self-incrimination, such acts cannot be relied upon to supply validity to an otherwise defective indictment and permit prosecution under a charge which would otherwise be barred by limitations. Any claimed waiver of such Fifth Amendment rights, supported only by notice of an investigation of substantive charges, and without notice of any conspiracy investigation, violates the principles enunciated by this Court in *Miranda*, and others 6

2. That reliance by the Government upon overt acts (i) and (j) as referred to in the indictment to extend the Statute of Limitations as to Count III was constitutionally impermissible and violative of petitioner's right to due process of law as guaranteed 8

3. In view of divergent application by the various Circuits, clarification is needed by the Court regarding the test for admissibility of evidence

under the federal shop-book rule, 26 U.S.C. § 1732(a). The absence of inherent trustworthiness of records as an essential element to such admissibility has resulted in a denial of due process to this petitioner 12

4. The joinder of an entirely separate conspiracy charge (Trial Count III), arising out of a wholly separate series of acts, transactions, scheme, plan or design, with two distinct substantive charges (Trial Counts I and II) is constitutionally impermissible where such joinder results in extreme prejudice to the defendant in the eyes of the jury, confounds his defense and permits the accumulation of unrelated evidence to be weighed against him; the present petitioner was denied a fair and impartial trial on the substantive charges against him because such impermissible joinder promoted a finding of substantive guilt solely by inference from massive and cumulative conspiracy evidence; and the joinder permitted herein is in direct conflict with the decision of this Court in *McElroy* v. *United States*, 164 U.S. 76, 17 S. Ct. 31 (1896) 19

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-393

A. HENRY TAGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING ON ORDER DENYING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL STATEMENT

Pursuant to Rule 58(2) of the Rules of the Supreme Court, Petitioner respectfully submits the within Petition for Rehearing of the Court's Order denying certiorari in these proceedings entered January 21, 1974, calling the Court's attention to substantial grounds available to Petitioner not previously presented.

ADDITIONAL QUESTIONS PRESENTED BY INTERVENING MATTER

1. Where petitioner's proven participation in alleged overt acts in furtherance of a conspiracy amounted to nothing more than acts of silence and failure to disclose information which would otherwise constitute valid exercises by him of his Fifth Amendment rights against self-incrimination, can such acts be relied upon to supply validity to an otherwise defective indictment and permit prosecution under a charge which would otherwise be barred by limitations. As a subsidiary question fairly comprised therein, does any claimed waiver of such Fifth Amendment rights supported only by notice of an investigation of substantive charges, and without notice of any conspiracy investigation, violate the principles enunciated by this Court in *Miranda* and others.

2. Whether the reliance by the Government upon overt acts (i) and (j) as referred to in the indictment to extend the Statute of Limitations as to Count III was constitutionally impermissible and violative of petitioner's right to due process of law as guaranteed.

3. Whether, in view of divergent application by the various Circuits, clarification is needed by the Court regarding the test for admissibility of evidence under the federal shop-book rule, 28 U.S.C. § 1732 (a), and whether the absence of inherent trustworthiness of records as an essential element of such admissibility has resulted in a denial of due process to this petitioner.

4. Whether the joinder of an entirely separate conspiracy charge (Trial Count III), arising out of a wholly separate series of acts, transactions, scheme, plan or design, with two distinct substantive charges (Trial Counts I and II) is constitutionally impermissible where such joinder

results in extreme prejudice to the defendant in the eyes of the jury, confounds his defense and permits the accumulation of unrelated evidence to be weighed against him; whether the present petitioner was denied a fair and impartial trial on the substantive charges against him because such impermissible joinder promoted a finding of substantive guilt solely by inference from massive and cumulative conspiracy evidence; and whether the joinder permitted herein is in direct conflict with the decision of this Court in *McElroy* v. *United States*, 164 U.S. 76, 17 S. Ct. 31 (1896).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

§ Rule 8(a). *Joinder of offenses and of defendants*

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

United States Code, Title 18:

§ 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

United States Code, Title 18:

§ 3282. *Offenses not capital*

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

United States Code, Title 26:

§ 7206(1). *Any person who—*

(1) Declaration under penalties of perjury—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . .

United States Code, Title 28:

§ 1732. *Record made in regular course of business; photographic copies*

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or

record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the orginal is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence.

ADDITIONAL REASONS FOR GRANTING THE WRIT PRESENTED BY INTERVENING MATTER

1. Where the petitioner's proven participation in alleged overt acts in furtherance of a conspiracy amounted to nothing more than acts of silence and failure to disclose information which would otherwise constitute valid exercises by him of his Fifth Amendment rights against self-incrimination, such acts cannot be relied upon to supply validity to an otherwise defective indictment and permit prosecution under a charge which would otherwise be barred by limitations. Any claimed waiver of such Fifth Amendment rights, supported only by notice of an investigation of substantive charges, and without notice of any conspiracy investigation, violates the principles enunciated by this Court in Miranda, and others.

The validity of the indictment in the trial Count III charge of conspiracy in the instant proceedings depended absolutely upon the occurrence of alleged overt acts (i) and (j) as a part of the alleged conspiracy. Without them, the charge would have been barred by limitations, as the next preceding alleged overt act occurred on April 18, 1966, and the applicable five-year statute of limitations under 18 U.S.C. § 3282 would have expired at April 18, 1971. The indictment was not returned until October 15, 1971.

Alleged overt act (i) charged that petitioner had a conversation with two special agents of the Internal Revenue Service on November 29, 1966; while alleged overt act (j) charged a conference with two special agents and a group supervisor on October 29, 1968. Both were prem-

ised on the theory that petitioner had failed to disclose all possible relevant information at the asserted meetings.

It is uncontroverted from the record that the "meetings" constituting overt acts (i) and (j) related to an investigation of petitioner's tax returns for years then in question. A taxpayer being investigated for purposes of criminal tax prosecution is entitled to knowledge of that fact and of his constitutional rights and privileges just as any other suspect being investigated in contemplation of his possible criminal prosecution. *United States* v. *Turzynski*, 268 F. Supp. 847 (N.D. Ill. E.D. 1967). Any information or advice given petitioner at those meetings upon which the Government might claim a waiver of Fifth Amendment rights would have necessarily have had to relate to possible substantive charges in connection with the returns for the years being examined. It is not claimed that petitioner was advised that he was the object of an investigation in relation to any conspiracy charge, nor that he was given any proper *Miranda* warning with respect thereto. *Miranda* v. *Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). Accordingly, any waiver of Fifth Amendment rights would have constituted an uninformed, and hence impermissible waiver.

If petitioner had not in fact effectively waived his Fifth Amendment rights against self-incrimination, the very acts which the government alleges as overt acts in furtherance of a conspiracy, were in fact valid exercises of his Fifth Amendment rights against self-incrimination. Petitioner respectfully contends that to allow the government to rely upon acts which are themselves valid exercises of Fifth Amendment privileges as acts in furtherance of a non-disclosed conspiracy charge, is itself a denial and violation of Fifth Amendment rights, and thus results in a deprivation of due process of law.

2. That reliance by the Government upon overt acts (i) and (j) as referred to in the indictment to extend the Statute of Limitations as to Count III was constitutionally impermissible and violative of petitioner's right to due process of law as guaranteed.

As aforestated in paragraph 1 of this petition, the two overt acts relied upon by the Government, a conversation with Internal Revenue agents on the 29th day of November, 1966, (i) and a conference interview with the Office of the Internal Revenue Service Intelligence Division in Kansas City, Missouri on the 29th day of October, 1968, (j) both took place after the focus of a criminal tax investigation had centered upon the Petitioner. Both also occurred after the alleged conspiracy had terminated as of April 18, 1966, when the Petitioner signed his 1964 Federal Tax return. The Petitioner had then withdrawn and the Statute of Limitations had tolled. As reflected in the indictment, the allegedly illegal activity on the part of the Petitioner was in not making records and information available, although his constitutional privilege would protect him from having to so incriminate himself. Accordingly, because of the constitutional protection against self-incrimination, the Government would be barred from returning an indictment against the Petitioner on these facts after April 18, 1971, unless the Government would be permitted the use of the tainted interviews as overt acts extending the Statute of Limitations. The indictment was in fact returned on October 15, 1971.

It is the apparent contention of the Government that during the two interviews, the Petitioner failed to disclose all adequate records in his possession. However, the exercise of the privilege against self-incrimination cannot be interpreted as an effort on the part of the Petitioner to wilfully engage in an overt act which could be construed

as a continuing violation of the statute. The Petitioner's unwillingness to incriminate himself would have to be interpreted as a segment of the conspiracy. Consistent with the authority of *Krulewitch* v. *United States*, 336 U.S. 440, 93 L. Ed. 790, 69 S. Ct. 716 (1949), wherein the Court rejected the implied agreement to conceal theory, the Petitioner submits that the two interviews could not have extended the running of the Statute of Limitations.

In answering the question as to whether the two interviews were in fact constitutionally protected, reference is made to the authority of *United States* v. *Wainwright*, 284 F. Supp. 129 (D.C. Colo. 1968), wherein it was held that the taxpayer became an accused so as to entitle him to warnings of his constitutional rights at the time his case was referred by the Internal Revenue Service Auditor to the Intelligence Division of the Internal Revenue Service. Upon the transfer from civil to criminal, the Petitioner was entitled to all the privileges and protections which the Fifth Amendment affords. Such being the case, the Petitioner herein was under no duty nor under any compulsion to give the Special Agents of the Intelligence Division any information which would tend to incriminate him. The exercise of Fifth Amendment rights cannot be used either to convict or to extend the pertinent Statute of Limitations.

As held in *United States* v. *Donovan*, 309 F. Supp. 152 (E.D. Va. 1969), persons defending a criminal prosecution for failure to comply with the wagering tax requirements "with a proper assertion of the privilege against self-incrimination cannot be criminally punished." Further, as stated in *United States* v. *Turzynski*, supra, a taxpayer being investigated for possible criminal tax prosecution is entitled to full knowledge of that fact and to all constitutional rights and privileges just as any other suspect being

interrogated in contemplation of possible criminal prosecution. Never having been adequately informed of the nature of the criminal action or of his constitutional protection as required by *Escobedo* v. *Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964), and *Miranda* v. *Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), and more particularly because of his inherent Fifth Amendment privileges, the Petitioner had no affirmative duty to provide the incriminating links and absent the affirmative duty, this assertion cannot be claimed by the Government as the overt acts necessary to maintain jurisdiction.

In *Marchetti* v. *United States,* 390 U.S. 39, 10 L. Ed. 2d 889, 88 S. Ct. 697 (1968) the Court held that the defendant's assertion of his Fifth Amendment constitutional protection against self-incrimination constituted a complete defense to prosecution. The Court further held that the defendant's failure to assert his privilege against self-incrimination to United States Treasury Agents at the moment the Federal Occupational Tax payments were due did not constitute irretrievable abandonment of his constitutional privileges. The controlling standard is whether the claimant is confronted by substantial and real and not merely trifling or imaginary hazards of incrimination. It is the Petitioner's contention, here, that his situation is analogous to that of *Marchetti,* supra. If he had produced the information sought by Internal Revenue Agents, it would, apparently, have been self-incriminatory and used as evidence against him. By remaining silent, as provided by the Constitution, the Petitioner could not have provided the overt acts alleged in the indictment. Such protected silence, then, occurred well after the completion of the alleged conspiracy. Neither, then, could such silence have the effect of reviving the conspiracy as the Government

contends. As aforesaid, *Krulewitch,* supra, rejected the theory of implied agreement to conceal.

If, arguendo, it could be said that Petitioner's failure to provide the sought after matter was a concealment of the conspiracy and thus indictable, this Court has clearly defined the provisions of conspiracy as they so relate in *Grunewald* v. *United States,* 353 U.S. 391, 1 L. Ed. 2d 931, 77 S. Ct. 963 (1957), where, in reaffirming *Krulewitch,* supra, and *Lutwak,* 344 U.S. 604, 97 L. Ed. 593, 73 S. Ct. 481 (1953) the Court held as follows:

> "The crucial teaching of *Krulewitch* and *Lutwak* is that after the central purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment. As was there stated, allowing such a conspiracy to conceal to be inferred or implied from mere overt acts of concealment would result in a great widening of the scope of conspiracy prosecutions, since it would extend the life of a conspiracy indefinitely. Acts of covering up, even though done in a context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators. And again, every conspiracy will inevitably be followed by actions taken to cover the conspirator's traces. Sanctioning the Government's theory would for all practical purposes wipe out the Statute of Limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators." 353 U.S. 401-402.

As in *Grunewald*, the Government cannot rely on the alleged acts of concealment to extend the life of the conspiracy so as to prevent the tolling of the Statute of Limitations.

3. In view of divergent application by the various Circuits, clarification is needed by the Court regarding the test for admissibility of evidence under the federal shop-book rule, 26 U.S.C. § 1732(a). The absence of inherent trustworthiness of records as an essential element of such admissibility has resulted in a denial of due process to this petitioner.

At common law, exceptions to the hearsay rule permitting the introduction of business records in evidence were each founded upon the same considerations: the usual reliability and trustworthiness of business records as compared with other memoranda, and the practical necessity of a resort to records when the person who made the entry and upon whose knowledge it was based was unavailable as a witness because of death, disappearance, insanity or other reason. *McCormick, Evidence,* § 281 (1954); 5 *Wigmore, Evidence,* §§ 1521, 1522 (3d. ed. 1940). Judges looked to a number of factors to determine whether records offered as evidence met the prescribed standard of trustworthiness set down by these early cases. See 5 *Wigmore, Evidence,* §§ 1522-27 (3d. ed. 1940). As the number and complexity of the various types of records necessary for the conduct of modern business grew, the requirement of probable trustworthiness presented an even more perplexing problem for the courts, and ultimately led to the statutory enactment of 28 U.S.C. § 1732 and a multitude of like state statutes.

The language of 28 U.S.C. § 1732(a) in providing that "all other circumstances of making such writing or record,

including lack of personal knowledge by the entrant or maker . . . shall not affect its admissibility" would seem to sanction admission of any regularly kept record prepared at or near the time of the event, regardless of its content or the informational source. See *McCormick, Evidence,* § 286 (1954). However, this Court and the courts of a majority of the circuits have been reluctant to extend the statutory exception to entries which lack the traditional earmarks of reliability. See, for example, *Hartzog* v. *United States,* 217 F. 2d 706 (C.A. 4th 1954); *New York Life Ins. Co.* v. *Taylor,* 147 F. 2d 297 (C.A. D.C. 1945).

Such decisions involve a determination that Congress intended the phrase "regular course of any business" to refer to the quality of the record as well as the regularity of its preparation. The legislative history of the Act furnishes no support for the position that a fundamental change from the common law requirement of probable trustworthiness was contemplated. See S. Rep. No. 1965, 74th Cong., 2d Sess. (1936); 80 Cong. Rec. 5733 (1936) (remarks of Congressman Sumners).

This Court had occasion to consider whether Congress intended to render all regularly prepared records admissible regardless of their character and source in the landmark decision in *Palmer* v. *Hoffman,* 318 U.S. 109 (S. Ct. 1943), and rejected this interpretation out of hand as unwarranted in view of the history of the Act. Mr. Justice Douglas, speaking for a unanimous Court, declared mere regularity of preparation to be an improper test of admissibility, and stated that the courts must look to the "character of the records and their earmarks of reliability . . . acquired from their source and origin and the nature of their compilation." *Id.,* at 114. Otherwise, "the probability of trustworthiness of records . . . would be forgotten as the basis of the rule." *Id.,* at 113-14.

Despite the fundamental necessity of probable trustworthiness as garnered from their origin and source as an essential test for admissibility of business records as laid down by *Palmer*, supra, a number of circuits, notably the Second, the Seventh, the Ninth, and the Tenth by reason of the decision complained of herein, have adopted divergent, conflicting and far less stringent safeguards. Thus, for example, the Second Circuit appears to have taken the position that the court should place primary emphasis on the mere "regularity" of the business practice in making records of the type offered, and in the absence of a motive to misrepresent, regularity in itself will be a sufficient guarantee of trustworthiness. See *Terrasi* v. *South Atlantic Lines, Inc.*, 226 F. 2d 823 (C.A. 2d 1955), *cert. denied* 350 U.S. 988 (1956); *Korte* v. *New York N.H. and H.R.R.*, 191 F. 2d 86 (C.A. 2d 1951). This cavalier approach of treating mere regularity of the business practice as the essential test for admissibility seems likewise to have been adopted by the Seventh Circuit, as evidenced by its decision in *U. S.* v. *Stonehouse*, 452 F. 2d 455 (C.A. 7th 1971). A second, but related approach, appears to have been adopted by the Ninth Circuit in its decision in *Standard Oil Co.* v. *Moore*, 251 F. 2d 188 (C.A. 9th 1957), *cert. denied* 356 U.S. 975 (1958), although the court therein does take strong note of the instruction from *Palmer*, supra, suggesting that a record cannot be considered sufficiently reliable unless it relates to the systematic conduct of the business as a business. Nevertheless, it expresses primary concern with whether the records contain information pertaining to the entrant's normal business operations rather than with the source of information upon which the record is based or the systematic procedure employed in its compilation.

Contrasted with the foregoing decisions of the Second, Seventh and Ninth Circuits, may be decisions of the Fifth,

Fourth, Eighth and District of Columbia Circuits, which clearly heed rather than avoid the fundamental instruction from *Palmer,* supra, regarding the necessity of trustworthiness which must be attached to any business record for its admissibility. Thus, for example, the Fifth Circuit, in its decision in *Sabatino* v. *Curtiss National Bank of Miami Springs,* 415 F. 2d 632 (C.A. 5th 1969) succinctly points out, at 637:

> "Thus the decisions excluding offered items indicate that the main reason for the statutory language 'in regular course of any business' is to provide a check on *trustworthiness* in that (1) *the records must be kept pursuant to some routine procedure designed to assure their accuracy,* (2) *they must be created for motives that would tend to assure accuracy . . ., and* (3) *they must not themselves be mere cumulations of hearsay or uninformed opinion.*" (Emphasis supplied)

See also *England* v. *United States,* 174 F. 2d 466 (C.A. 5th 1949). Support for this position is likewise found by the Fourth Circuit in its opinion, *United States* v. *Grow,* 394 F. 2d 182 (C.A. 4th 1968), which clearly enunciates at 205:

> "The test of admissibility under Title 28, § 1732, is not that the party making the entry must identify and explain the document, but rather that the record must carry with it some guaranty of trustworthiness. Admissibility is to be determined by the character of the records and their earmarks of reliability acquired from their source and origin and the nature of the compilation."

See also *Hartzog* v. *United States,* 217 F. 2d 706, 710 (C.A. 4th 1954), which is particularly similar to the case at bar in that the record of transactions there sought to be introduced represented the unjustified conclusions of the

entrant, and were the product of his judgment and discretion and not the product of any efficient clerical system then being carried forward in the regular course of business. The conclusion properly to be reached likewise finds support in the Eighth Circuit decision in *Skogin* v. *Dow Chemical Company,* 375 F. 2d 692 (C.A. 8th 1967), where the learned discussion by Judge Gibson (at 705) concerning the inherent untrustworthiness of records laden with unsupported conclusions on the part of the entrant, and the difficulty in defining the exact point at which conclusions become objectionable, should be noted with particularity. For cases from the District of Columbia Circuit supporting the teaching of *Palmer,* supra, as to the absolute requirement of trustworthiness which must be attributable to such records, see *Lyles* v. *United States,* 254 F. 2d 725 (C.A. D.C. 1957), *cert. denied* 356 U.S. 961 (1958); and *New York Life Insurance Co.* v. *Taylor,* 147 F. 2d 297 (C.A. D.C. 1945).

Turning to the case at bar, petitioner's conviction under Count II of a three-count indictment, in which he faced the substantive charge of filing a false income tax return for the calendar year 1964, turned almost entirely upon evidence adduced from Government Exhibit 13-A, a cash disbursement journal of Policy Budget Plan, Inc., a corporation in which petitioner had an interest. The exhibit was identified by a Mr. Theodore Ewing, a co-owner of the company, and on the basis of his testimony, was admitted into evidence by the court as a business record properly admissible under the provisions of 28 U.S.C. § 1732(a). The journal in question contained a listing of checks issued by the company during the early months of 1964, and provided columnar extensions for the purpose of categorizing the purposes for which the checks were drawn. The government sought to prove that some $27,065.75 in checks drawn payable to petitioner and a Buick automo-

bile agency during the month of January 1964, and additional checks dated in February through April of that year represented unreported income by petitioner from the corporation, as against petitioner's contention that they represented loans. Although a column appeared in the journal for categorizing payments as salaries, none of the checks in question were so categorized. All were listed in a column identified as "sundry" and with the sole exception of the check to the automobile agency, bore no further explanation. As to the latter, it showed only that it was for the purchase of an automobile. In the course of his testimony, Mr. Ewing testified variously that:

(a) The entries in the journal were made largely by an employee who was described merely as an employee of the bookkeeping department (Tr. 162), with no testimony being offered as to her background or skill as an accountant, or with respect to any training or ability which she might have for making the types of conclusions regarding payouts to petitioner which the Government sought to imply from the journal;

(b) That said employee had incorrectly posted at least one $5,000 payment allegedly made to petitioner, which was in fact a check to Western Union in the amount of $250 (Tr. 165, 166);

(c) That Mr. Ewing himself borrowed money from the company (Tr. 131); that all such loans, including both those to petitioner and Ewing were noted in the sundry column (Tr. 182); that his own withdrawals as loans were not marked any differently than those of petitioner (Tr. 183); and that he considered the journal entries, summaries and checks testified to as loans to petitioner and due by him to the company (Tr. 183);

(d) That the car purchased with the check drawn payable to the automobile company could be considered a company car (Tr. 185); and

(e) That the cash disbursement journal was not kept currently in the normal course of business from and after January 1964 (Tr. 181); that beginning specifically in January 1964, checks were not posted in any kind of chronological order either as to date or number (Tr. 160); and that there was evidence that the records were inaccurate (Tr. 191).

Additionally, Ewing testified that the admitted journal was only one-half of a dual entry set of books (the other one-half being a general ledger rejected in evidence by the court), and that the entries reflected therein would not be representative of entries made in the regular course of their business without introduction of the second half of the entry (Tr. 116, 117).

In its opinion, the Tenth Circuit affirmed the trial court's ruling of admissibility of the cash disbursement journal under 28 U.S.C. § 1732. Under the most favorable interpretation possible, this could constitute no more than an affirmation of the limited and seemingly erroneous construction attributed to the statute by the Second and Seventh Circuits in their decisions in *Terrasi, Korte,* and *Stonehouse,* supra, that mere regularity of the business practice in making records of the type offered provides sufficient guaranty of trustworthiness. The petitioner would contend that not even regularity has been shown in this case. In any event, the clear and stringent requirements respecting trustworthiness set out by this Court in *Palmer,* supra, have without question, not been met.

These conflicts, together with the prejudice occasioned petitioner by the wrongful admission of the subject journal, justify the grant of certiorari to review the judgment below.

4. The joinder of an entirely separate conspiracy charge (Trial Count III), arising out of a wholly separate series of acts, transactions, scheme, plan or design, with two distinct substantive charges (Trial Counts I and II) is constitutionally impermissible where such joinder results in extreme prejudice to the defendant in the eyes of the jury, confounds his defense and permits the accumulation of unrelated evidence to be weighed against him; the present petitioner was denied a fair and impartial trial on the substantive charges against him because such impermissible joinder promoted a finding of substantive guilt solely by inference from massive and cumulative conspiracy evidence; and the joinder permitted herein is in direct conflict with the decision of this Court in McElroy v. United States, 164 U.S. 76, 17 S. Ct. 31 (1896).

The Trial Court joined two separate indictments over the objection of petitioner's counsel. Counts I and II of the first indictment charged violation of 26 U.S.C. § 7206(1) relating to income tax returns filed by petitioner for 1963 and 1964. Count III of a separate indictment charged violation of 18 U.S.C. § 371 relating to an alleged conspiracy from 1962 to 1971. Each indictment required its own distinct evidence and witnesses. No connection was ever established between Counts I and II and Count III. The great bulk of time and energy at trial was devoted to the conspiracy charge. Great masses of brokerage records and other evidence, as well as volumes of testimony were attendant thereto. By contrast, the trial time attendant the substantive Count II charge of which petitioner was likewise convicted was infinitesimally small. The evidence in support of this charge consisted almost entirely of a single Government exhibit, Exhibit 13-A, and testimony through which it was admitted.

This Court has previously condemned such joinder:

"We do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence and in no sense resulting from the same series of acts." *McElroy* v. *United States*, 164 U.S. 76, 17 S. Ct. 31 (1896) at 79-80.

Here petitioner was compelled to defend two lawsuits.

"Appellant should not, according to the ancient formula, be confounded in making his defense. *Castellini* v. *United States*, 64 F. 2d 636 (C.A. 6th 1933). The petitioner was definitely confounded in making his defense.

The mass of evidence used to support the conspiracy charge is far more difficult to explain and contain than a fraudulent tax return charge. As a result the joinder precluded petitioner from testifying with regard to the tax return charge.

"Prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence. *Cross* v. *United States*, 335 F. 2d 987 (C.A. D.C. 1964) at 989.

The prejudice is not limited to defending the case but also the effect this may have on the jury.

In *Drew* v. *United States*, 331 F. 2d 85 (C.A. D.C. 1964), the court stated:

"Prejudice to defendant by joinder of offenses may arise in that (1) defendant may become embarrassed or confounded in presenting separate defenses; (2) the jury may use evidence of one crime to infer a criminal disposition of defendant from which is found his guilt of the other crime; or (3) the jury may cumulate evidence of various crimes charged and find guilt when, if considered separately, it would not so find; prejudice may also reside in

latent feelings of hostility engendered by the charging of several crimes as distinct from only one." (Syl. 4)

The far flung and sprawling evidence presented concerning the conspiracy charge can and did have a confusing effect on the jury and resulted in the jury regarding one offense as corroborative of the other, when this was not the case. See 74 Yale L.J. 553 (1965).

The effect on the jury is evident when it is noted that the statute charged in Count II requires specific intent and the Government was required to demonstrate that the petitioner knowingly and wilfully committed the acts alleged. Only the unconstitutional Exhibit 13-A (as previously discussed) was presented to support the allegations of Count II. Eliminating that exhibit from consideration, the only other possible explanation for the jury decision is the bulk of time and energy spent on the conspiracy charge which spilled over into Count II. The jury cumulated the evidence of Count III to find guilt, when if Count II was considered separately, it could not so find. See *Drew* v. *United States,* supra.

Neither the case law nor the Federal Rules of Criminal Procedure (see 18 U.S.C., Rule 8) condones such a joinder. The obvious and substantial prejudice occasioned by the joinder prohibited and denied petitioner a fair and impartial trial and warrants a reversal of the conviction in Count II.

CONCLUSION

Petitioner respectfully submits that for the additional reasons stated herein, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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CERTIFICATE

The undersigned, Counsel for Petitioner herein, hereby certifies that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay. Counsel further certifies that the Petition is restricted to substantial grounds available to Petitioner but not previously presented.

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